FIRST SESSION—THIRTIETH PARLIAMENT
1974-75

THE SENATE OF CANADA

PROCEEDINGS OF THE

STANDING SENATE COMMITTEE ON

BANKING, TRADE AND COMMERCE

The Honourable SALTER A. HAYDEN, *Chairman*

Issue No. 40

WEDNESDAY, JUNE 4, 1975

First Proceedings on:

"Consideration of the subject-matter of Bill C-60, Bankruptcy Act, 1975."

REPORT OF THE COMMITTEE

(Witnesses: See Minutes of Proceedings)

29170—1

THE STANDING SENATE COMMITTEE ON BANKING, TRADE AND COMMERCE

The Honourable Salter A. Hayden, *Chairman*

The Honourable Senators,

Barrow	Hays
Beaubien	Laird
Buckwold	Lang
Connolly (*Ottawa West*)	Macdonald
Cook	Macnaughton
Desruisseaux	McIlraith
Everett	Molson
*Flynn	*Perrault
Gélinas	Sullivan
Haig	Walker—(19)
Hayden	

**Ex officio* members

(Quorum 5)

Order of Reference

Extract from the Minutes of the Proceedings of the Senate, May 13, 1975.

"The Honourable Senator Hayden moved, seconded by the Honourable Senator Bourget, P.C.:

That the Standing Senate Committee on Banking, Trade and Commerce be authorized to examine and report upon the subject-matter of the Bill C-60, intituled: "An Act respecting bankruptcy and insolvency", in advance of the said Bill coming before the Senate, or any matter relating thereto; and

That the Committee have power to engage the services of such counsel, staff and technical advisers as may be necessary for the purpose of the said examination.

After debate, and—
The question being put on the motion, it was—
Resolved in the affirmative."

Robert Fortier,
Clerk of the Senate.

Minutes of Proceedings

Wednesday, June 4, 1975
(54)

At 9:50 a.m. the Standing Senate Committee on Banking, Trade & Commerce proceeded to the consideration of:

SUBJECT: *Consideration of the subject-matter of Bill C-60, Bankruptcy Act, 1975.*

Present: The Honourable Senators Hayden, (*Chairman*), Cook, Desruisseaux, Everett, Flynn, Haig, Laird, Macnaughton, McIlraith, Molson, Sullivan and Walker. (12)

Present, not of the Committee: The Honourable Senator Lafond. (1)

In Attendance: Mr. M. C. Zwaig, C.A., and Mr. David Baird, Advisers to the Committee.

A detailed explanation and analysis of the provisions of the Bill was presented to the Committee by the advisers.

At 12:00 noon the Committee adjourned until Wednesday, June 11, 1975 at 9:30 a.m.

ATTEST:

Denis Bouffard,
Acting Clerk of the Committee.

The Standing Senate Committee on Banking, Trade and Commerce

Evidence

Ottawa, Wednesday, June 4, 1975.

The Standing Senate Committee on Banking, Trade and Commerce met this day at 10 a.m. to consider the subject matter of Bill C-60, respecting bankruptcy and insolvency.

Senator Salter A. Hayden (*Chairman*) in the Chair.

The Chairman: We now commence our study of the subject matter of the bankruptcy bill. The committee has before it a copy of Bill C-60, which looks somewhat terrifying in its proportions.

We have our experts with us this morning. On my immediate left is Mr. Melvin C. Zwaig, a member of Thorne Riddell & Co., a firm of chartered accountants which has offices all across Canada. We have had other members of that firm before us as expert witnesses in our consideration of other bills. We had Albert Poissant and Charles Mitchell; we had Tom Hierlihy on the tax bill; and we still have John Lewis on Bill C-2. Possibly our selection is made because we recognize that there is a lot of wisdom identified with that firm, and they work well with us. I do not think we will be disappointed in Mr. Zwaig. Next to Mr. Zwaig is Mr. David Baird from Toronto, of the legal firm of Harries—what is the rest of that name?

Mr. David Baird (Harries, Houser, Brown and McCallum): It has been changed to Harries, Houser.

The Chairman: If Mr. Baird can forego his shyness for a moment, I will say he is recognized and vouched for by some of the leading people in the field of bankruptcy as being number one in the field of bankruptcy law in legal circles—certainly so far as Toronto is concerned. I think his reputation goes much further than that.

I think we have a good team. The chairman has already had a huddle with them as to how the presentation might proceed. We hope to cover quite a lot of ground this morning. If we do not, we shall have to contemplate whether we will sit at 2 p.m. for an hour or so. The only risk, in a complicated bill of this kind, as I pointed out to our experts, is that there is a limit to the capacity of anyone to collect and collate all the information if too much of it is fed in at one time. Even a computer might break down under those circumstances. So we will exercise judgment and decide at 12.30 p.m. whether we have had enough, because members of the committee will have a transcript which they can read at their leisure.

This is a practice we have followed in studying other bills, so that we have a book of reference. With that in mind, Mr. Zwaig will commence the proceedings, dealing with the question of administration. Then, in turn, Mr. Baird will fall into line and pick up where Mr. Zwaig drops a particular subject.

I think I have stated your method of treatment, Mr. Zwaig. It is now your turn to start the proceedings. Before you begin, I should say that I have caused to be distributed—I left instructions yesterday—a statement showing the treatment of secured creditors under this bill. I thought it would be convenient, on such an important subject, to have an annotation giving the subject matter of the various sections and page numbers dealing with the position of secured creditors. We then have a handy reference to which to refer. We did not proceed to quote the actual sections, as we thought the members of the committee could read them. We have indicated what we think is the substance of each section. They are now being distributed.

Senator Laird: Mr. Chairman, may I make one suggestion before our experts start in on us? The photocopy of the article in the *Financial Post*, which you sent us, has the headline "Another Bureaucratic Horror Spawned by Bankruptcy Bill." Quite frankly, in conversation with people who have spoken to me about this bill, this has been a matter of great concern. As the witnesses proceed, perhaps they could pay some attention to that particular angle.

The Chairman: That is one of the subject matters we will develop, to attempt to indicate the extent to which there is an extension of bureaucracy, and what is involved in staffing to meet the additional things that are in this bill. Some of the things we may talk about are beneficial in themselves. It is just a case of how we are going to handle them. I do not think anyone on the committee is in favour of spawning a bureaucracy. Enough of that exists without any conscious or deliberate spawning.

Senator Laird: I agree.

Mr. Melvin C. Zwaig (Thorne Riddell & Co.): Thank you, Mr. Chairman.

Honourable senators, perhaps I might commence with the following statement, that prior to my appointment to this committee I undertook a contractual obligation to have a commentary published by Richard De Boo of first impressions on this bill. I have been advised by the publishers that the commentary will b published on Thursday. So prior to next Wednesday's meeting you will have a 70-page document of commentary on the bill, of first impressions.

I should like to discuss Part II of the bill this morning, Administration. As under the present Bankruptcy Act, the administration of insolvent and bankrupt estates will continue to be performed by the Superintendent of Bankruptcy, the Official Administrator—who is referred to under the present act as the Official Receiver—the courts, trustees and creditors' Representatives' inspectors. The Superintendent of Bankruptcy and his deputees will continue to be appointed by the Minister of Consumer and Corporate Affairs. It is, however, proposed that the Superintendent's only obligation to the minister is to report to him annually on the administration of the Bankruptcy Act. Appoint-

ments previously made by the superintendent on the recommendation of the minister will now solely be within the discretion of the Superintendent of Bankruptcy.

Responsibility will continue with the Superintendent for the supervision and administration of legislation. His power will be substantially increased through the delegation to bankruptcy administrators of the functions presently exercised by the courts. In addition, the Superintendent's powers of investigation will be expanded to include proposals. He will also have the right to examine under oath and without a court order any individual whom he believes may have committed an offence under the Bankruptcy Act, or other federal legislation, as well as any individual whom he believes may have knowledge of the insolvent's affairs.

Functions presently performed by the Official Receiver will be assumed by the administrator, who will also tax bills of costs submitted by solicitors, accountants, trustees, or interim receivers, whose function is presently reserved to the Registrar. In determining the remuneration to be awarded, the bankruptcy administrator will refer to applicable tarifs, the duration and nature of services rendered, the size of the estate, and the results achieved.

While both solicitors and trustees have ultimate resort to the courts for the taxation of their accounts should they disagree with the administrator's allocation, there are certain difficulties inherent in having a professional's account set by an administrative process. Apart from the historical jurisdiction accorded the courts to fix solicitors' fees, there is also the possibility that an efficient bankruptcy administrator may, in his enthusiasm to preserve assets for the creditors, tax a bill with undue harshness. Courts and registrars are more familiar with the status of the legal counsel who appear before them and can better appreciate the amount of work and detail that went into any individual estate.

In small estates, the cost and nuisance factor involved in bringing the matter ultimately before the courts for resolution may well outweigh the gain to the professional involved. There, too, is the danger that if a solicitor or trustee finds that accounts are too often subject to excessive review, they may opt out of bankruptcy practice altogether and pursue other avenues of legal or accounting work. Unless clear guidelines are established for administration, there is the danger that the most capable members of the legal and accounting professions will decide to abandon this area of practice for areas in which they can receive remuneration commensurate with that received by their fellow professionals.

The Administrator will administer small debtor arrangements, consumer bankruptcies, and in the matter of commercial bankruptcies will administer a particular estate where a private trustee cannot be found or, subsequent to his appointment, dies. When acting as an interim receiver, or trustee, the administrator will be entitled to receive the same remuneration and expenses as the private trustee. However, his bill of costs will be taxed by his own superior, the Superintendent of Bankruptcy. Certainly, on the face of the bill, the role and function of the present registrar have been removed.

The Chairman: Eliminated.

Mr. Zwaig: That is correct. The Official Receiver presently is a federal employee attached to the office of the Superintendent of Bankruptcy, and what the Superintendent of Bankruptcy intends to do is remove the office of the registrar from the courts, moving his functions over to the Official Receiver, to permit the bankruptcy administrator, Official Receiver, to perform quasi-judicial functions.

The Chairman: Perhaps this would be the place where you might interject how smoothly, how expeditiously, the procedures and proceedings are carried out under the present system with the registrar.

Mr. Zwaig: The proceedings today in the provinces of Quebec and Ontario, and other provinces with which I am familiar, involving bankruptcy take place rather quickly. The request for an appointment of an interim receiver, petition for a receiving order, are dealt with rather expeditiously. By having a registrar there and by not being required to serve notice, things move along much more expeditiously than is proposed in the new legislation. Also, the trustee is then in a position to take control of the assets much more quickly.

I would like to point out to the committee, Mr. Chairman, that in the United States there are presently two bills before the Senate on amendments to the U.S. Bankruptcy Act. There is what is referred to as the "Commission Bill," and this is a bill which has evolved as a result of a committee similar to our Canadian committee studying and preparing the bill. Also, the members of the Bar and the bankruptcy juges found objection to that bill, particularly as it dealt with the bankruptcy administrator. In the current issue of the *Commercial Law Journal*, May, 1975, there are two paragraphs which I should like to quote. These were written by the chairman of the Bankruptcy Committee of the Commercial Law League of America, and read as follows:

> The Commission Bill provides for a new administrative agency to be created within the executive branch which will exercise not only administrative functions handled by bankruptcy judges under the present Act, but which would also discharge many judicial functions. In addition, the Administrator would, to a large extent, replace private trustees, attorneys for wage-earner debtors and the Securities & Exchange Commission.

Our legislation does not go that far. Continuing:

> The Judges' Bill, on the other hand, provides for a director within the judicial branch whose authority would, in general, be limited to the administrative duties now imposed on bankruptcy judges and their clerical assistants.

The Board of the Commercial Law League states that they have already rejected the Commission Bill on the appointment of this official administrator, or, as they refer to it, the "all powerful administrator" within the executive branch as proposed by the Commission. They state:

> In that respect, therefore, the Judges' Bill is far more compatible with the official position of the League.

I quote that to emphasize the point that, in my mind, the present function of the Official Receiver and the Registrar can be expanded both by themselves to a point which would make what I believe the smooth-running of the bankruptcy administration now much more compatible and much more expeditious, rather than impose this super bankruptcy administrator, in order to be the watch dog over the administration, and whom I think will make the administration of the Bankruptcy Act much more cumbersome.

Senator Macnaughton: May I ask a question? I underst-nad our expert witness is, in effect, describing the administration clauses of this bill, and at the same time criticizing it. We have two parts to it.

Mr. Zwaig: Yes, if I may.

The Chairman: I think that is what we want. Do you see any objection to that?

Senator Macnaughton: Not at all. I was under the impression that he was merely going to describe the bill, but he can assume that we have read it.

The Chairman: If there is any error in that, it was my instruction that the weaknesses or defects in the bill, as we saw them, should be earmarked for your attention.

Senator Walker: As he goes along.

The Chairman: As we go along.

Senator Walker: That is much better. It is just what we are doing.

The Chairman: Merely a lecture on the clauses of the bill would not necessarily give you that. We can always change that procedure, but I take it that this is what the committee wants.

Senator Macnaughton: There is no objection. It is just to put it on the record.

Mr. Baird: We will try to delineate between the provisions and comment, and try to make it clear where we are talking about the present act and this new bill, and our comments on it. If we can clarify it in that way it may be helpful to you.

Mr. Zwaig: Persons not qualified to act as a trustee in a particular estate are set forth in an all-encompassing list, which includes a person who, within the two immediately preceding years, was a director or officer of the debtor, or an employee, employer or relative of such director or officer, an accountant, an auditor or solicitor to the debtor, and their partners. Also disqualified is a trustee acting in the bankruptcy or proposal of a related company.

Perhaps I could make a critical comment on that part. A situation could evolve where a trustee is acting in the bankruptcy of a parent company, and due to circumstances, perhaps because of inter-company transactions, perhaps because of further investigation that is required, the inspectors of the parent company advise and recommend for the bankruptcy of any subsidiary companies or related companies. What the bill is suggesting is that a separate trustee be appointed for these related or subsidiary companies. This becomes an almost impossible task, in that you are dealing with more trustees and more inspectors, rather than keeping the matter within the existing group of appointed trustees, inspectors and solicitors. I fear that there could be an increase in administration costs by having fresh trustees and fresh solicitors dealing with related matters.

Senator Flynn: Do you think it is clearly intended to prevent the appointment of a trustee? I know it is in the bill, but do you think it was the intention to provide such a restriction? With respect to the rest, all the others who are not qualified to act, I think I would agree generally speaking, but in this particular case probably it is an oversight.

Mr. Zwaig: I hope it is. I agree with the other list. The Canadian Institute of Chartered Accountants certainly has restrictions, as does the Bar Association. I certainly hope it is an oversight.

The Chairman: Is there not a restriction that a lawyer who has acted for the debtor within two years of the bankruptcy proceedings or arrangement is prohibited from acting in these proceedings?

Mr. Baird: Yes, there is. It is in the definition of conflict of interest in the new bill. One of the deemed conflict of interest positions is where a laywer has acted for the debtor, or anyone related to the debtor, for a period within two years prior to the date of bankruptcy, and that is prohibited.

The Chairman: Do you have a note of that clause?

Mr. Baird: Clause 28 of this bill, page 20. There is the exception in clause 28 which provides that with the permission of the court a laywer who has acted for the debtor can continue to act for the trustee in bankruptcy. It might be desirable to have a similar qualification for the situation of a trustee, because there is always the exceptional case where it is desirable that the same person act. Even though there is a technical conflict position, the practical advantage of having one person who knows all the affairs of the company and having him available as trustee in bankruptcy would make good sense. You could say that with the permission of the court a trustee could act for a related company, and that might be the protection the creditors need. It gives some flexibility.

The Chairman: Clause 28 says two years.

Mr. Baird: Yes, two years. Perhaps I might comment there. It goes as far as saying that the trustee in bankruptcy of a husband cannot act as trustee in bankruptcy of a wife. That is how blantant clause 28 is. That is at the top of page 21, paragraph (b) (iii); that is the prohibition which seems to go pretty far.

Mr. Zwaig: In contrast with the present situation, where a trustee may also act for a secured creditor to assist in realization of his security, often at an economy to the estate, the bill now states that once a trustee has agreed to act as trustee he is precluded from acting or assisting a secured creditor in this manner.

My comment on this aspect of the bill is as follows. Where a trustee does act as trustee for unsecured creditors and accepts either prior or subsequent appointment to act as agent or receiver-manager for a secured creditor, he may very well be in a conflict of interest position. However, assuming that the situation arises where there is no conflict, and really all that the trustee in bankruptcy is doing is advertising the assets for sale subject to the secured creditors' rights, I think it would be again an instance of incurring double costs if the secured creditor must appoint his own trustee in that situation. I think the restriction imposed in the first part of clause 28 is adequate, and the restriction imposed in clause 29, where they are insisting that there is a conflict in all circumstances, might perhaps be toned down slightly to give the trustee, in the situation where there is no apparent conflict, the right to act. It would appear also that if a trustee discovers that, for any reason whatever under the bill, he is in conflict, once having accepted in good faith an appointment to act as trustee, his only recourse is by application to the court for direction.

Private trustees will continue to be responsible for the administration of commercial arrangements, commercial bankruptcies and receiverships. Trustees will continue to be licensed by the Superintendent, apparently in his sole discretion and without the prior authority of the minister. The Superintendent will also have the authority to repeal trustee licences without the approval of the minister.

The provisions dealing with the cancellation or non-renewal of a trustee's licence are, on first impression, rather curious. Where the Superintendent intends either to cancel or not to renew a licence he must give written notice of his reasons to the trustee and afford the trustee a reasonable opportunity to be heard. At any hearing the Superintendent has the power to administer oaths, and, although not bound by the legal or technical rules of evidence, is required to deal with the matter informally, expeditiously and fairly, and is then required to cause a summary of any oral evidence to be made. The notice, together with a summary of oral evidence, together with other documentary evidence, form the record of the hearing. Following the hearing, the decision of the Superintendent, together with his reasons, shall be given in writing to the trustee within a specified period of time.

What is so curious about all this is that the language of the bill is clearly referring to quasi-judicial determination by administrative officers in a form that may be reviewed or subject to appeal in a conventional legal manner. However, the bill provides no appeal procedure whatever for a trustee whose licence may be lost by the determination of the Superintendent, even after the hearing. It would appear however, that a judicial review of the Superintendent of Bankruptcy decision is available under the provisions of the Federal Court Act. One would think that in the interest of natural justice a direct appeal to the courts in such circumstances should be included within this bill.

As for licensing of trustees generally, provisions have been made to facilitate the licensing of corporate trustees, thereby overcoming the difficulties presently encountered in obtaining authorization so to act in several provinces.

The bill proposes the establishment of a bankruptcy indemnity fund to which trustees licence issuance fees, interest earned and not attributable to a specific estate, and money recovered from claims paid out of this account, will be credited. The establishment of this account will serve to replace the function presently performed by bonding companies and it comes as a result of creditors and the superintendent apparently having encountered difficulties in obtaining satisfaction from bonding companies in the past.

I would like to point out that the form used by the bonding companies is one that is taken directly out of the existing Bankruptcy Act.

I have acted for and on behalf of the superintendent in one instance, where there were two bonding companies involved. One bonding company paid immediately upon claim. The other bonding company insisted upon a judgment of the court. That is the only difficulty I personally have had.

On the other hand, as an aside, the cost of bonding is a charge against the administration of an estate. There are three types of bonds that are required, under the present law, to be filed by a trustee. There is a trustee bond which is an overall bond renewable annually upon the issuance of the licence. There is a second bond which is imposed by the official receiver at a meeting of creditors and it must be deposited for the specific performance on each estate. Then there is a third bond which is in fact a government of Canada bond which must be deposited with the Superintendent of Bankruptcy based on the number of outstanding estates under the trustee's administration.

I think there is triplication of the bonding requirement as it presently exists. I think the bond performance on each individual estate perhaps is redundant, in that a larger proportion of trustees are chartered accountants and, as a result, have existing professional liability insurance, and I think it would be covered there. This is just as an aside, but it is a matter that I am sure will come up because the bonding companies are going to be eliminated from a source of income, and I am sure that we will be hearing from them.

The Chairman: They may be able to switch over from the provision of bonds to this fund that will be set up. There is still, would you say, a substantial element of cost?

Mr. Zwaig: As I read it, the cost would be the same and there is a substantial element of cost. There is nothing in the act which says that anyone can make a claim against the bankruptcy indemnity fund and be paid. Any of the existing provincial insurance indemnity funds for car accidents defends any actions against the respective fund.

The Chairman: The money in this fund under the bill, how do you get at it, who spends it and who has a right to spend it?

Mr. Zwaig: We do not really know. I imagine it would be a claimant against a trustee for performance, and he would probably have to go after the trustee and bring the indemnity fund in as a participant to the action.

The Chairman: The indemnity fund would be operated in the nature of a trust fund?

Mr. Zwaig: As I read it, yes.

The Chairman: And in the name of the Superintendent?

Mr. Zwaig: That is correct.

The Chairman: Then the claimant might have to join the Superintendent as a third party in the proceedings?

Mr. Zwaig: That is correct.

The Chairman: So while you may be changing the methods of approach, substantially you are going to have the procedure by a claimant, and you are going to have a cost that will be relatively the same?

Mr. Zwaig: That is correct.

Mr. Baird: It is most desirable that the cost be reduced. The present bonding cost—if anyone prepared statistics on it—would be found to be very high compared to the number of claims that have been made. An attempt should be made, either through this fund or through some other process, to reduce the cost. The present costs are too high.

Senator Flynn: For all the bonds, or for the general bond which is provided by each trustee? Or are you speaking of the individual estate?

Mr. Baird: The individual estate bonds. The fees that are received by bonding companies at the present time for individual estates, the number of claims—I have never acted or been involved in an estate where there has been a claim made.

Senator Flynn: You say the cost is very high. Do you mean to the applicant? Do you mean that the new system proposed would maintain the cost, or that it would improve the situation?

Mr. Baird: The act is not clear on that.

Mr. Zwaig: It is definitely not clear on that. I think that they are looking for a source of revenue.

Senator Flynn: Mr. Baird, from what you say it would appear that they would operate at cost.

Mr. Baird: I would hope so.

Senator Flynn: So it would be an improvement.

Mr. Baird: Once they build up a fund large enough to meet what they think the need would be, I would hope they would stop any further revenues. This would be the ideal approach to the situation.

The Chairman: Then the Superintendent would be the one who would invest the fund?

Mr. Baird: Yes.

The Chairman: And who fixes the costs which may be levied against the individual trustee as a contribution to the fund?

Mr. Zwaig: If we follow the present act, it is the Official Receiver, so I envisage it would be the Bankruptcy Administrator.

The Chairman: I see.

Senator Laird: Will not this make it very difficult for the private trustees to continue in business?

Mr. Zwaig: I think it will probably be difficult for private insurance companies to continue in business, in this aspect of the business. As far as the private trustees are concerned more specifically, I think they will continue. If all these administrative recommendations are adopted, you may find that the cream of the private trustees may decide to go back to their accounting practice and you may get a lesser quality of trustee continuing on as a private trustee.

Senator Flynn: Not necessarily as a consequence of this.

Mr. Zwaig: Not as a necessary consequence of the bond.

Senator Flynn: Because, from what we hear, it is quite possible that it would cost less than the present bond.

Senator Laird: If that is so, that is what is worrying me—is it a fact that it is likely to cost the private trustee less?

Senator Flynn: You say it is costing too much now.

Mr. Zwaig: I think the Superintendent of Bankruptcy quite frankly is looking for a source of revenue to put into that fund, and I would be surprised if the cost is less. I think it will probably be the same as the existing bond, but certainly not less.

Mr. Baird: It is a question of what the fund is going to be used for. If it is only going to be used to pay claims, it could be less, because I think the statistics will show, calculating the number of claims versus the bond premiums that have been paid, that the bond premiums total much more that the actual claims made against the fund. If they are going to use the fund for other purposes, then it is quite right, the cost is the same. But if they are going to use it solely as an insurance fund—

Senator Flynn: Is there any indication that it would be used for other purposes?

Mr. Baird: As an indemnity?

Senator Flynn: It seems to me that the fund is going to replace these individual estate bonds.

Mr. Baird: Yes, that is true and they call it an indemnity fund, which indicates it to be an insurance fund.

Senator Flynn: You are suggesting that the premiums are now too high, but if the fund were operated on a cost basis it would certainly mean a decrease.

The Chairman: Senator Flynn, who could have a right to get at this fund?

Senator Flynn: Anyone who has a right to get after the insurer of the trustee.

The Chairman: Yes. So long as the fund is not available to be applied in any other direction. There is nothing in the bill on that.

Mr. Zwaig: No. It seems that the fund is primarily to be used in the same manner as any claims would be presently used.

Senator Macnaughton: The fund is under the control of the Superintendent, and, obviously, the costs of his office will be increased and he will be looking round for a source of funds to pay more employees. Therefore, he has the money and he says, "Well, you boys can pay."

The Chairman: I assume that when you take a bond from a bonding company all the administrative costs of the bonding company are reflected in the premium you pay.

Senator Flynn: And the profit, too.

The Chairman: Yes.

Mr. Zwaig: It would be an interesting question to ask the Superintendent, because I have tried to determine from his annual reports the cost of the bond to individual estates. I am sure he would have that statistic readily available. Probably this question should be directed to him.

In the last report of his which I have available, March 31, 1973, the revenue in his department is $466,000. This is from fees paid by trustees, the 2 per cent levy and what he calls "official receivers' fees." He also collected $600 on fines from prosecutions as well as a miscellaneous item of $1,874.

It would be this $466,000 per annum plus the premium from these bonds which would go into this indemnity fund account.

Senator Flynn: He would have to report on the state of the fund. He would have to justify any charge made against it.

Mr. Baird: You might note that the clauses dealing with the fund, referring to the indemnity account, are clauses 57, 58 and 59 on pages 34 and 35. Clause 57 says that the moneys going into the indemnity account are:

> . . . the fees payable to the Superintendent pursuant to paragraph 19(2)(a).

Well, paragraph 19(2)(a) is, basically, licence fees for licensing a trustee in bankruptcy. There are also the amounts to be paid "pursuant to subsection 33(6)." That requires the interest on a trust account to be paid in. Paragraph 57(2)(c) is "the moneys recovered in satisfaction of any claim paid out of the Indemnity Account." If these are the only three items to be paid into the indemnity account the cost will be much less than the existing bond premiums.

Senator Flynn: It would seem that nothing can be charged against the indemnity but the payments he has to make to indemnify a claimant. Paragraph (3) says:

> There shall be charged to the Indemnity Account all payments made pursuant to section 59.

If it is operated by the Superintendent without a charge, then apparently it is an advantage.

Mr. Baird: If it is limited on that scope it is a good suggestion and is an improvement over the present system.

Mr. Zwaig: As I mentioned earlier, the present system is rather redundant in that there is a duplication, if you have a professional liability bond and are then required to deposit three different types of bonds. It might help if the bond per estate could be eliminated, because I just do not see that it is a necessity at all.

The Chairman: Except that I do not know whether the levy, by virtue of which this fund is built up, will reflect and give credit for professional bonds. For instance, I do not know whether the levy will be less to give credit for the protective bonds which chartered accountants acting as trustees carry in any event. If it is not, then you have a duplication of the situation which exists at the present time.

Senator Flynn: Under the present system each estate is charged a share of its responsibility, whereas with the new system there would be an overall contribution without any particular estate being taxed especially.

Mr. Baird: That is correct.

The Chairman: Perhaps there should be a provision with respect to professional persons, like CAs, who are acting as trustees, requiring them to maintain this protective bond.

Senator Flynn: If it is not too expensive.

The Chairman: Then the contribution to the fund would be substantially less.

Mr. Baird: The answer to that—and I have discussed it with representatives of the Superintendent—is that they would then be delegating the right to license trustees to the insurance companies or bonding companies, as opposed to the Superintendent of Bankruptcy, because, they say, if you cannot get a public liability bond you cannot practice as a trustee. They feel that they are delegating licensing power to an insurance company or bonding company and they feel that that is undesirable.

Senator Flynn: What would be the result of maintaining the general liability insurance? You would have to go first against the company before going against the fund.

The Chairman: If you have an automobile accident in Ontario, thereafter, in order to continue your licence, you must secure a bond. If it were a qualification that a professional, who was going to act as a trustee, had to have this public liability insurance, then why should he either have to pay a premium on a bond separately or have to make a contribution in respect of that same potential liability to this fund?

Senator Flynn: You may be right. It is one system or the other.

The Chairman: The answer may be that the amount of the public liability protection which the professional who is acting as a trustee has may not be adequate to cover all his liabilities. That is very likely the answer the Superintendent will make. I think it is a matter we should inquire about.

Senator Flynn: Either you have to adopt this system or keep the old system and improve it by removing the special bond.

Mr. Zwaig: That is right.

The Chairman: There is redundancy in the present procedure, obviously.

Mr. Zwaig: If we are going to change it, we might as well change it all the way.

The Chairman: Yes.

Mr. Zwaig: At present trustees must maintain trust accounts in chartered banks. The bill would permit a trustee to maintain trust accounts in corporations that are insured under the Canada Deposit Insurance Corporation or guaranteed by the Quebec Deposit Insurance Board, thus opening up a wider range of deposit-seeking institutions available to the trustee.

The Chairman: What would that include?

Mr. Zwaig: That would include the Montreal City and District Savings Bank, as an example.

Senator Flynn: And the caisses populaires—the credit unions?

Mr. Zwaig: It would include the caisses populaires and the credit unions, I believe.

Senator Molson: All the near-banks, in other words.

Mr. Zwaig: Yes.

Senator Flynn: They are all insured?

Mr. Zwaig: They are all insured under the Quebec Insurance Board, yes.

Senator Flynn: I do not know about the federal scheme. Are they insured to the same extent in the other provinces? I think the trust companies are, in any event.

Mr. Baird: I think it is a $20,000 limit under the Canada deposit insurance scheme.

Senator Walker: That would be applicable here, of course.

Mr. Baird: Yes. That would be.

Mr. Zwaig: Bill C-60 was drafted on the premise that creditors are not interested in assisting in the administra-

tion of bankrupt estates. Therefore, increased government control is proposed. This is inconsistent with the comment of the White Paper that was tabled in Parliament on December 18, 1970, wherein it was stated, "The apathy of creditors to take part in the administration of an estate in bankruptcy can very well be explained by reason of Crown priority. Very often, for the creditors to involve themselves in the administration of estates, is equivalent to their volunteering as agents of the public treasury."

The welcome removal of the Crown priority alone will no doubt result in a more reasonable distribution to the ordinary unsecured creditors, which in turn will be reflected in greater creditor interest in the administration of bankrupt estates, even without the necessity of the introduction of the increased degree of government control and supervision now contemplated. To achieve such self-starting control will, of necessity, result both in an increased bureaucracy and a removal of the summary nature of the bankrupt procedures presently available, giving rise to lengthy administrative and procedural delays.

The Chairman: You mean available before the registrar.

Mr. Zwaig: That is correct. Whereas the act has been referred to as a "business man's act", the proposed legislation will be beyond the comprehension of all but the sophisticated creditors.

Senator Flynn: Is that not the case presently?

Mr. Zwaig: The bill seems to be even a bit more complex. It will make it a bit more complex.

The Chairman: I suppose we could make the same criticism of the Income Tax Act, that it is beyond the comprehension of even sophisticated people.

Senator Molson: We have already made that criticism.

Mr. Zwaig: Those are my brief comments on Part II, which deals with the administration.

Senator Flynn: I want to be clear about what will be, from now on, the functions of the Official Receiver. Is there any substantial change in his responsibilities?

Mr. Baird: They will be extended. All the present functions will be continued, which are, to receive voluntary assignments in bankruptcy, to appoint the trustee, to chair the first meeting of creditors, and to examine the bankrupt under oath. These are, basically, the existing functions of the official receiver.

These are going to be enlarged to include taxing trustees' fees and solicitors' fees, as Mr. Zwaig has said; they are going to be required to investigate under proposals; they are going to act as chairmen both of the first meeting of creditors in bankruptcy and the first meeting of creditors in a proposal; they are also going to determine whether or not the bankrupt should get his discharge, and this is a significant change of function. Up until now the Official Receiver has had very little discretionary function. This is going to be changed, and he is going to have a much broader range of functions.

Senator Flynn: He takes over some of the registrar's responsibilities?

Mr. Baird: Yes. Now he assumes some of the creditors' duties. At the present time it is the creditor who has the right to oppose the discharge of a bankrupt, and this is going to be changed under the present new act. Only the Official Receiver will be given the right to—

Senator Flynn: —grant a discharge?

Mr. Baird: No.

Senator Flynn: This is done by the court.

Mr. Baird: It will still be done by the court, but there will be an automatic discharge after 90 days from the date of bankruptcy unless the administrator or Official Receiver files a *caveat*, and if the administrator files a *caveat*, then there is a court hearing, and the court will determine whether or not the bankrupt will be discharged, or whether or not he will stay in bankruptcy for a maximum of five years.

Senator Flynn: There is no objection to the length of the delay?

Mr. Baird: It will be 90 days.

Senator Flynn: After 90 days.

Mr. Baird: Yes.

Senator Flynn: Now what about the administrator? Does he have the same functions as the Official Receiver?

Mr. Baird: Yes; it is just a change of name.

Senator Flynn: So you will not find in the act, any more, the words "Official Receiver".

Mr. Baird: That is correct.

Senator Flynn: It will be "administrator".

Mr. Baird: Yes.

Senator Flynn: And the registrar disappears also.

Mr. Baird: Yes. He disappears also. This is a serious point. Mr. Zwaig has already touched on it. From a legal point of view we have what functions in each province as a sort of separate bankruptcy court. We have a Registrar in Bankruptcy who hears minor judicial matters, in our common law system—like the Master, for example, which you do not have in Quebec—and then we have our bankruptcy court judge, who, although he is a judge of the Supreme Court, is delegated to hear bankruptcy matters. He sits on a special day and only hears bankruptcy matters. In Ontario there is one week a month during which he sits to hear bankruptcy matters. This system works extremely well. We get our bankruptcy cases heard much sooner than the normal civil trial. In Toronto a non-jury trial—and Senator Walker knows this—takes up to two years—

Senator Walker: Even up to three years.

Mr. Baird: Yes, even up to three years before it gets heard.

Senator Flynn: Will that be changed by the act?

Mr. Baird: Yes.

Senator Flynn: But the court remains the court. Will they still have a bankruptcy court?

Mr. Zwaig: Not *per se*, but by eliminating the registrar, and giving the bankruptcy administrator the functions of both the official receiver and the registrar, they have introduced certain delays, which may be all dangerous

delays. Also they have given the administrator a quasi-judicial function. In most instances the administrator is, from the experience that we have in Quebec as well as in other provinces, not a lawyer, for the most part; he is usually an accountant, and I just do not think that he is in a position to render these quasi-judicial decisions, or carry out these quasi-judicial functions.

Senator Flynn: The courts will continue to operate as before?

Mr. Baird: I am not sure, sir. The reason for that is there is no suggestion in the new act that there will be a specific judge designated to hear bankruptcy matters.

Senator Flynn: They have not changed the court system provided under the present act. A judge of the Superior Court of Quebec, for instance, will be assigned to sit in bankruptcy, and he will deal only with bankruptcy matters on a given day.

Mr. Baird: Yes. That is possible under the new act, too; but it is not designated.

Senator Flynn: Why do you say it is possible?

Mr. Baird: Well, the Supreme Court has the function of hearing all bankruptcy matters, and the Chief Justice of the Supreme Court could designate a separate judge.

Senator Flynn: My question is, is there any change as far as that is concerned?

Mr. Baird: Yes. Under the old act he was required to designate a judge to hear bankruptcy matters.

Senator Flynn: And has this disappeared?

The Chairman: Not "required".

Mr. Baird: Well, he is entitled to.

Senator Flynn: I would like to see that section.

The Chairman: The Supreme Court judges could, in a meeting, get together and say to one of their number, "You are the bankruptcy judge"; but they would also change him from time to time.

Senator Flynn: Yes. That is the present system.

The Chairman: But under the present law it is required that there be a judge designated. That gives you continuity.

Senator Flynn: No, no. That is not the way it works. You have separate records for the bankruptcy division, if you want to call it that. That is, the Superior Court sitting in bankruptcy, or the Supreme Court sitting in bankruptcy.

Mr. Baird: That is correct. At the present time you have a separate office, you have a separate registrar. He records all documents relating to bankruptcy matters, and he is separate and apart from the registrar of the Supreme Court, who keeps the records for other matters.

That concept has been abolished under the new act.

Senator Flynn: Where would you find the section dealing with that?

Mr. Baird: The old section is section 155 of the old act. I am quoting the old act for you.

> . . . may, if in his opinion it is advisable or necessary for the good administration of this Act, nominate or assign one or more of the judges of the court to exercise the judicial powers and jurisdiction conferred by this Act that may be exercised by a single judge . . .

That provision is deleted from the new act. There is no mention of any designation or nomination of a particular judge to hear bankruptcy matters, and it is my opinion that with this deletion the chief justice of the various provinces will not designate one judge to hear bankruptcy matters; they will allow bankruptcy matters to be heard in the normal course of all civil proceedings, and I think this is a very retrograde step.

The Chairman: You may have to go into Weekly Court in Ontario.

Mr. Baird: That is correct.

Senator Walker: That would be a shocking situation; it would be going back to the way it was 40 years ago.

Senator Laird: And what about the matter of the workload in that connection if you have these automatic 90-day discharges?

Mr. Baird: The concern is that the administrators or the official receivers will not be able to do their function properly and therefore the 90 days will go by without any attempt being made to oppose a discharge. If there is insufficient staff to deal with the workload, that 90 days will go by very quickly. The bankrupt who should not be discharged receives his discharge.

Senator Laird: And this, of course, will affect the workload of any judge, and under the existing system that would be a designated judge, designated by the Chief Justice. But let us suppose that this point were restored to this bill, or, in the alternative, whether or not it were in the act, if the Chief Justice of, say, Ontario were to continue his present practice of designating one judge for bankruptcy purposes, that automatic discharge you have mentioned would undoubtedly affect the workload.

Mr. Baird: It would undoubtedly reduce the workload.

Senator Laird: They simply would not have the cases before them.

Mr. Zwaig: I think some of the concepts and ideas in this new bankruptcy bill are excellent. But I think that they have introduced a rather cumbersome method of operating and administering the bill. They could continue quite conceivably with the present registrars and official receivers, and if they wanted to change the name to "bankruptcy administrators," then that would be fine. But I think that they can—and I think this will come out through the course of our study—do the same thing, but simplify their procedure, because I think that wage earners or consumer debtors who get into trouble should have the right of having an inexpensive method of being financially rehabilitated. It is just that the way they have done it is a very cumbersome method.

Senator Flynn: I find the wording in clause 373.(1) very strange. There it says:

> 373. (1) Every court has original jurisdiction in bankruptcy and in other proceedings, except proceedings under Part X, instituted under this Act during their respective terms and in vacation and in chambers.

What does that mean? It says "every court". Does that mean that a county court would have jurisdiction?

Mr. Baird: The court is defined in the definition clause to be the supreme court of the province. That is on page 2 of the new bill, so I think that that is limited to the superior court of a province.

Senator Flynn: So they would abolish in fact what we used to say was the Supreme Court Bankruptcy Division?

Mr. Baird: Yes.

Senator Flynn: Such as exists under the present legislation?

Mr. Baird: Yes, and without some guidance from the legislature or from Parliament creating a separate court, I am of the opinion that the Chief Justice of an individual province will not maintain that separate court; I think he will abolish it. And as well as abolishing the separate Supreme Court judge to hear bankruptcy matters, the abolition of the Registrar in Bankruptcy is, I think, a bad step in the sense that it will cause problems. You see, the registrar now feels that his allegiance requires him to hear bankruptcy matters first and he deals with those on an expeditious basis. If you need an interim receiving order, which is an order you apply for when you file a petition in bankruptcy, and if you think the debtor is going to dispose of his assets very quickly, you have the right to apply under the present law for an order appointing an interim receiver. The registrar in Toronto, and in most other places, sits from 9 until 5 or from 9.30 until 4.30 every day of the week and you can walk into his office—and you don't have to have an appointment and you don't have to set the matter down—and you can get your order. I had a situation where I acted for a supplier of furniture, and he came in to see me and he was very concerned that the furniture store was in trouble and that things were going wrong. We decided to file a petition in bankruptcy and to appoint an interim receiver. This we did, and we got the order late in the afternoon, we gave it to the interim receiver. He went to the store, and there were trucks there taking the merchandise out the back door. If we had been a day later, that furniture would have gone. Now this expeditious procedure, I am very much afraid, will be lost under the provisions of the new legislation. They just do not provide for a person who has chief responsibility on bankruptcy matters.

Senator Flynn: I think you are right. Clause 375 says:

> 375. The practice and procedure of the court, including the practice in chambers and the holding of examinations, shall be its ordinary procedure in civil proceedings, unless the practice or procedure is inconsistent with this Act or such regulations respecting practice and procedure and the holding of examinations as may be prescribed.

There is certainly a danger of mixing ordinary civil proceedings with proceedings in bankruptcy.

Senator Laird: Mr. Baird, coming back to the case of the designated judge under the present system, while I know from talking to some of my friends who have held this position that sometimes it becomes irksome after a period, nevertheless such a person acquires special knowledge in this field which simply is not available to every Supreme Court judge and, therefore, this change is bound to slow up the whole process.

Mr. Baird: That is very true. Ninety per cent of lawyers do not get involved in bankruptcy matters and, therefore, are not as familiar with them as we would like them to be. Therefore, when they take over as a judge they have the same problem in that they are not familiar with the concept, the background and the terms. There is no magic in it, it is as easy as any other type of law, but it requires familiarity.

Senator Laird: That is right, and if you spread the task of dealing with bankruptcy matters among all the judges of the Supreme Court of Ontario you are going to find that they will be slow because they will not know enough about the act.

Senator Flynn: That could be true of many other fields too. I think you will have to organize some specialization in law courses before long.

Mr. Baird: Well, you have some specialization in income tax and you have specialization in patents, so I think that specialization is on its way. It is recognized that the fields in law are getting complicated and that any one person has difficulty in mastering a broad range.

Mr. Zwaig: If I may continue, these are my thoughts and comments on Part III which deals with a new concept called "Arrangements for the Consumer Debtor." A consumer or wage earner debtor is an individual who is insolvent or unable to pay his debts, who is not carrying on a business and his debts, excluding those secured by real property, are less than $10,000. Special rules are provided for dealing with these persons.

Bill C-60 provides that the insolvent consumer or wage earner debtor has three possible alternatives. The first is that he may file an arrangement by way of extension for the full payments of his debts. He may file an arrangement by way of composition whereby he will pay his creditors in full settlement of their claims something less than 100 cents on the dollar, and finally he has the last resort solution, that is bankruptcy in which the debtor may be discharged within three months or at the maximum five years. Arrangements by both extension and composition are, in fact, a refinancing of the individual's debts over a three-year period, which may, with the approval of the creditors, be extended for an additional year to four years by the administrator should circumstances warrant such extension. In addition, the administrator may assist in the financial rehabilitation of the debtor.

In 1971 the Brookings Institution of Washington, D.C. made a study on bankruptcy in the United States where the United States legislation has similar arrangement plans and came to the conclusion that these arrangement plans did not work. The random statistics included in that study indicated that 83 per cent of the consumer or wage earner debtors chose the last resort solution, that is bankruptcy, as opposed to filing arrangements. Statistics which I obtained just last week for 1973 indicate that the 83 per cent is now 85 per cent. In one state approximately half the debtors have taken advantage of the arrangement plan three to four times and a small number in that particular state, which is Alabama, have filed as many as 14 arrangements. These debtors have been classified as habitual and were, in fact, using the arrangement plan office as a bill-paying service.

In my opinion and in order for any arrangement to be effective the debtor must refrain from acquiring new creditors while under an arrangement and the amount available to the debtor as disposable income must be

adequate to meet emergency situations, such as family illnesses, unemployment and so on.

Although some debtors may choose to enter these arrangements, a far greater number, in my opinion, will opt for the last resort solution in order to get relief from their debts. If they can get a discharge from their debts within 90 days, they may very well opt for that.

Bankruptcy appears to be the only solution, in my opinion, for the low-income debtor, whose income and expenses are fixed. The middle-income debtor, who can benefit the most from the plan, will object to living on a budget and an allowance as determined, without a right of appeal, by this bankruptcy administrator.

In 1970 Professor Zeigel of Osgoode Hall Law School, York University, made a study on the Quebec Lacombe law plan. He reported that if all debtors under that voluntary payment scheme maintained their schedule of depositing the seizable portion of their salaries only 39 per cent of the debtors would discharge their debts in five years. Taking into account periodic defaults in deposits and the concurrent creation of new debts, it appears that under an orderly payment of debt scheme few depositors can free themselves from the crushing burden of debt.

In June 1972 the Canadian Consumer Council made a presentation to the Honourable Robert Andras, Minister of Consumer and Corporate Affairs of the day, in which they are talking about the Lacombe law. They are talking about the Part X, which is the consolidation of debts under the existing Bankruptcy Act, and they use Alberta as a model. Again I would like to quote.

The Chairman: We should add there that Part X of the present Bankruptcy Act deals with the question of the orderly payment of debts. It may be brought into operation in any province by statutory enactment or by Order-in-Council. As I understand it, only three of the Western provinces have brought Part X into operation provincially.

Senator Flynn: Manitoba was first.

Mr. Zwaig: It is presently in effect in Alberta, Manitoba, Saskatchewan, British Columbia, Nova Scotia and Prince Edward Island.

Mr. Baird: It is just recently in those others, though.

Mr. Zwaig: Yes.

The Chairman: But, in effect, is it correct to say that the effect of the arrangement provisions in this bill could be referred to the effort to bring Part X of the existing law into the bankruptcy bill?

Mr. Zwaig: That is correct.

The Chairman: As part of the federal bankruptcy law.

Mr. Zwaig: That is correct.

Senator Laird: Might I also ask this question: There have been private organizations which have operated on the basis of accepting moneys from the debtor and arranging with the creditors for time payments. In the experience of you gentlemen, has that system worked under private enterprise?

Mr. Zwaig: Not really. I have in my years of experience accepted one informal arrangement such as that. Inevitably it just deteriorates; the man gets a job in another province, another jurisdiction, and just vanishes.

Senator Laird: Will it operate any better because it is included in the statute?

Mr. Zwaig: In my opinion, not.

Mr. Baird: I differ slightly. The problem is that under private arrangements a 100 per cent approval of all creditors is required. This is very difficult to obtain without some form of statutory compulsion. I do not say it will work perfectly and also have reservations. However, I do not feel that a categorical "no" is appropriate, either. I have experienced situations in which clients would like to make arrangements to pay their creditors over a period of time and want them to hold off from taking proceedings or garnishee-ing their wages in order to give them a chance to do that. The number of arrangements, though, in which this works out, is very few, which is the problem. We are going to do a tremendous amount of work to make an arrangement available for a situation in which I think relatively few are involved. It is a question of policy as to whether this type of arrangement should be available for those who wish to pay their debts. This is a good thing from the social point of view, rather than declaring bankruptcy. However, we are now establishing a very detailed system for this. The major problem with such arrangements and one not even mentioned in the legislation is that of new debts. The same man who is already in difficulty as a result of being unable to manage his affairs, in a great majority of cases continues to experience that difficulty. It is a question of can a leopard change his spots. Hopefully in some cases he can, but experience has shown that in many cases he cannot. That is our concern.

The Chairman: On the experience, for instance, in the United States—and I believe we are attempting to learn the experience in the provincial jurisdictions in which Part X has been adopted—it would appear, first, that a very small percentage of those who are insolvent will elect to go the route of arrangement or proposal. The question is as to the value of providing all the aspects of this system and staffing it for administration for the number who may be involved. I believe one of you has some figures with respect to that.

Mr. Zwaig: I have some figures taken from the Consumer Council report to which I referred. At present, many individuals under Part X are not capable, nor do they wish to make an arrangement, but they cannot afford personal bunkruptcy. Given access to inexpensive facilities, it is assumed that they would opt for relief through bankruptcy. To support our 40 per cent assumption we refer to the three sources of data: (1) a study of a sample of debtors under the Lacombe law showed that 20.4 per cent made no payments at all in the nine months following their application and 48 per cent were delinquent in their payments. (2) The same study showed that if payments that were made were maintained at the same rate over a five-year period, only 39.6 per cent of the debtors would have discharged their debts in full at the end of this period. (3) Finally, statistics on consolidation under Part X administered by the Debtors' Assistance Board in Alberta show that of 596 orders in effect, 45 per cent were over 90 days in arrears. In addition, of 1,018 orders taken up to December 30, 1971, 27 per cent had either defaulted, been discontinued by the debtor or had gone into bankruptcy.

Senator Laird: I suppose that is why the Brookings Institution report apparently found that most people ended up in bankruptcy after all.

Mr. Zwaig: The Brookings Institution in the United States made a similar study.

Senator Laird: I realize that. I had never heard of it, but obviously you have an expert knowledge on the matter. Their report, as I understand it, indicated that most people opted for the ultimate—namely, bankruptcy.

The Chairman: If you take the figures of personal bankruptcies in Canada—you have some figures there—and the United States percentages of those who opt for bankruptcy, you will see there is a very small remnant left who elect to go the arrangement route. Then, in the United States, while you had a figure of 85 per cent of individuals who opted for bankruptcy, another 12 per cent at some time or other abandoned their arrangement course and went into bankruptcy. If you add those percentages together, the percentage, on United States figures, of those who availed themselves, or would be left to avail themselves, of the arrangement procedures would be a very insignificant number—a very insignificant number.

Senator Laird: Exactly.

Mr. Zwaig: To support that argument—again I am using the Superintendent of Bankruptcy's figures for the year ended March 31, 1973—during that year there were 3,086 non-business bankruptcies. Over the years they have broken down these figures. Of the 3,086, 2,452 individuals at the time of their bankruptcy had assets of less than $500. Another 412 had assets ranging between $500 and $1,500. So you are talking in terms of 2,864 of the 3,086 who have assets of less than $1,500. If we are talking in terms of dollar values—unsecured assets of $1,800,000 against liabilities of $54 million.

Take that in total and relate it to arrangements set by composition, arrangements by extension, they are the type of people who will throw in the towel and say, "Look, let's opt for a last resort bankruptcy solution. Let's discharge our debts."

I am saying there is a federal trustees program available. The limitations are so low for those who can apply for that relief and go bankrupt for a fee of $50, that one of the areas that should be considered is to increase those ceilings. They impose rather severe restrictions on the number of people who can apply under this federal trustee program. It means they can go personally bankrupt for a $50 charge. They say that at the time of his application the debtor must have debts of at least $1,000; he must not be self-employed; he must not have income in excess of $3,000 if he is single and $5,000 if he is married. You can add $500 for each child to that figure. Also, he must not have any business debts, and he must not own property of more than $2,000 in value after deducting the amount due to second creditors. So from that you can see they have made the ceiling very low. As a result, they themselves have been directing people who need this rehabilitative process of going bankrupt to the private trustees who, in fact, do the same work for $550 as opposed to $50.

Senator Flynn: Are those conditions transferred in this act?

Mr. Zwaig: No, they are not transferred. This is an existing program. They are not transferred into this act.

Senator Flynn: What is the date of that act?

Mr. Baird: We do not know.

Senator Flynn: It would not be fair to assume that there would be the same conditions.

Mr. Baird: The background paper provides that the administrator, as opposed to the private trustee, will take over all wage-earner bankruptcies. There is nothing in the act itself that provides for this.

Senator Flynn: There is a suggestion. My point is that apparently you are saying the arrangement system under this legislation will not work, and will simply add to the personnel of the Superintendent, to the bureaucracy, and so on and so forth. You are suggesting that in the end all these people who are in financial difficulty should become bankrupt.

The Chairman: No. I think what he is suggesting is that they should take the cheap bankruptcy route under the federal statute.

Senator Flynn: Yes—should become bankrupt right away instead of waiting three years. You have been saying that some people have not been able to pay their debts over several years, and they have made an arrangement over an arrangement. You are now suggesting that as a consequence you will have a bankruptcy, and in two months or four months you will have another bankruptcy—bankruptcy over bankruptcy. I do not see the difference on the administrative level. I think people should be encouraged to some extent to try to pay their creditors, at least partly. If bankruptcy is the only solution, you are creating a state of affairs that will be far worse than the fact that people may not be able to live up to some arrangement.

Mr. Zwaig: Under the existing act, Senator Flynn, there is provision for a proposal. We do not see that many individuals taking advantage of a provision which you can translate into the proposed arrangement scheme under the new act. I am suggesting that we have the proposal schemes available, but do not create a bureaucratic monster to administer them.

Senator Flynn: You will not have a monster if people do not use the arrangement any more than they use the proposal system.

Senator Laird: It will still be a monster.

Senator Flynn: It may still be a monster, but it will not be worse. Under the present system or proposal, if there is a default you have an automatic bankruptcy, and you could have that with the arrangement.

Mr. Baird: That is something I intended to propose—it is not present under the new act—that if an arrangement failed and there was a default for three months, there should be an automatic bankruptcy. It would simplify the administration.

Senator Flynn: I agree. But the opportunity should always be given a debtor to try to pay, at least partly, his creditors; otherwise there is no other solution in bankruptcy. You will have successive bankruptcies every three months, since you have a discharge every three months under the present legislation.

Mr. Zwaig: In addition, Senator Flynn, talking about the bureaucratic horror spawned by the bankruptcy bill, as

headlined in the *Financial Post*, I have not seen it, but the Registrar of the bankruptcy court in Montreal has brought to my attention that at the end of February he noticed an advertisement in the newspapers from the office of the Superintendent of Bankruptcy looking for bankruptcy administrators.

Senator Laird: I have here a copy of one of those ads.

Senator Macnaughton: Do I understand the proposition is that the present provision, vis-à-vis this type of person, is very necessary?

The Chairman: On the basis of statistics, there will have to be a tremendous reformation in the attitude of debtors in the lower brackets of indebtedness and income if any material use is to be made of the arrangement provisions. Mr. Zwaig was talking about what exists at present—is it in the Bankruptcy Act at present?

Mr. Zwaig: Yes; you can make a proposal.

The Chairman: —where one can make a proposal. Possibly the difficulty lies in the limitation in dollars in the present Bankruptcy Act, because it does not reflect the effect of inflation and higher incomes.

Senator Flynn: What is it you are referring to, the $1,000 debt?

The Chairman: I think the figure was $3,000.

Mr. Baird: These were the figures relating to the use of the public trustee, not the limitations applicable to arrangements or proposals.

The Chairman: It may be that those figures should be increased. There are very few within the limitations of the present law.

Senator Macnaughton: Perhaps it comes down to updating the present system and replacing the proposed with the present.

Mr. Zwaig: That would be a simplified modification. What I would like to see come about is the arrangements become an integral part of the new legislation. However, the bureaucratic system must be such that it would not increase to nightmare proportions, and there must be a continuity of steps.

To give you an example, if an individual is in default for three months under an arrangement, his creditors come back with their original amounts. The individual then has to go off and petition himself, as the bill says, into bankruptcy. There really should be a continuity of steps. If he is in default, then he automatically goes into bankruptcy. Whoever the trustee is, whether it is the administrator, public sector trustee or private sector trustee, those assets should vest with the trustee directly, and there should not have to be the necessity of going through another route, thereby making the whole process a cumbersome one.

Senator Flynn: We could perhaps accommodate your views through minor amendments to this legislation.

Mr. Zwaig: Yes.

The Chairman: We are attempting to arrive at some figures to establish the potential number of persons, on a statistical basis, who would be available and who might make use of the arrangement procedures. We are also attempting to establish, or estimate, the number of administrators who might be appointed. I coined an expression which I think I used in talking to you the other day, that being that I would hate to end up with a situation where we had almost as many administrators as there were debtors seeking to take advantage of the arrangements. In that case, we would be providing a nursemaid for every debtor. This, I think, must have been behind the article in the *Financial Post* when it talked about spawning a bureaucratic system. This is a practical point to which the committee will have to address itself.

Senator Flynn: It would be nice if we could establish that kind of control, not only under the Bankruptcy Act, but in all federal legislation dealing with administration.

Senator Macnaughton: This should comprise a very interesting section of our future report.

Mr. Baird: I might comment on the present proposals. They really are not suitable for small wage earners because they are too expensive. They require the use of a private trustee and usually specifically designed proposals prepared by a lawyer. The costs are just too great for the small wage earners.

Mr. Zwaig: I agree. However, if we can meld the new recommendations into the old, or the existing legislation into the new, I think we can come up with something that is satisfactory without spawning this "bureaucratic system" that has been referred to.

Senator Laird: Is there still a stigma attached to bankruptcy, such as there was in the past, or are people becoming immune to that sort of thing?

Mr. Zwaig: Quite frankly, for the first time in many years I had occasion to attend court in Montreal on the day that applications for discharge were being heard, and I was absolutely surprised at the ages of those seeking discharges, as well as the reasons. The age had gone down considerably. As to the reasons, it was that a young girl decided to go around the world on a cruise and on being confronted with the bills decided to go into bankruptcy. This is the type of problem we have to deal with.

The other thought I should like to leave with the committee is that these arrangements are going to come under an act that will be referred to as the "Bankruptcy Act." We are talking in terms of people not wanting to go into bankruptcy and, therefore, opting for an arrangement. However, what do you think will be listed on the credit card files in respect of those who have filed an arrangement? The word "arrangement," by composition or extension, is too long, and all that will be used is a great big stamp saying "Bankruptcy Act."

Senator Laird: Is that necessarily bad?

Mr. Zwaig: He will still be left with the same stigma which he was trying to avoid by not going into bankruptcy.

Senator Laird: Do these people, such as this girl you referred to, not realize that their line of credit will be affected by pulling a stunt like that? Is that not some sanction?

Mr. Baird: There are still some sanctions. To say no one cares about going into bankruptcy is not true. People do not make the decision to go into bankruptcy lightly. They come to see me to talk about it. There is still some stigma attached to it. There may be a small minority who do it

frivolously, but the majority of people do not want to go into bankruptcy. They come to me and ask me how they can avoid it. The first question I am asked is, "What can I do to avoid bankruptcy?", and I am the one who has to tell them that in a practical sense they must go bankruptcy, that there is no other remedy available.

Senator Flynn: If you remove the proposal provisions from this bill and deal with them under another piece of legislation, you would have the same problem. You would have two bureaucracies, which is worse.

Mr. Zwaig: Yes. At this point we are not talking about the bureaucracy; we are talking about the stigma.

The Chairman: Mr. Baird, who bears the cost in a case where the debtor, in the first instance, wishes to make a proposal or an arrangement?

Mr. Baird: It is the debtor who pays the costs; he pays the fees of the trustee. The government does not get involved in the payment of any costs. This is all arranged privately under the present proposal arrangements. The debtor must put up, usually, a deposit to cover the costs of making the proposal, having it filed, having the notice sent to creditors, and the work that is done by the trustee.

The Chairman: But very often his financial position may be such that that would be a barrier, and yet his potential in the way of his earning capacity may, looking ahead, be such that it would increase to the extent that he could finance on an instalment basis over a substantial period of time. There are people who would prefer to do that rather than have the designation or stigma of being called a bankrupt.

Of course, we know there are a lot of professional debtors. I do not mean people who practise the profession, but people who are professional in incurring debts, and I do not think the thought of bankruptcy would bother them at all. When their debts pile up to the point where they cannot deal with them, they simply go into bankruptcy. I am sure there is a fair percentage in that category.

Mr. Baird: I do not think it would be more than 10 per cent. I do not think you can apply that to the majority of cases. The problem you raised concerning the costs of the existing proposal arrangements, Mr. Chairman, is an existing problem, and the government is trying to solve that problem by introducing provisions dealing with arrangements under the supervision of the Administrator, who is a public official, resulting in no costs to the debtor.

The Chairman: But there is a cost to the taxpayers.

Mr. Baird: Yes.

Mr. Zwaig: The bill proposes to give creditors little say in the administration of consumer and wage earner debtor arrangements. Creditors do not have the power to reject an arrangement by way of extension of time and, accordingly, there is no provision for a meeting of creditors. The creditors could, however, object to the amount determined by the administrator as required to be deposited by the debtor. The objection is filed with, and adjudicated upon by, the administrator who made the original determination.

The Chairman: It is quite unlikely, if the administrator makes the original proposal, that immediately after that he would turn around and say that the amount of the deposit is not sufficient. If you tie the two in together without making some statutory provision for what the amount should be the answer would appear to be a very obvious one, that what the administrator proposes is what the proposal is going to be.

Senator Macnaughton: He is too busy to reverse himself.

The Chairman: Yes.

Senator Flynn: Does the administrator decide only the amount that is going to be deposited, or does he fix the amount the creditor is going to receive eventually? Is 100 per cent payment provided in the arrangement?

Mr. Baird: There are two terms. There is an arrangement by way of extension of time and an arrangement by way of composition.

Senator Flynn: You can have both at the same time.

Mr. Baird: If it is an extension arrangement, which is the term I have used for purposes of convenience, it means that there will be a payment of 100 cents on the dollar. If it is a composition arrangement, it means there will be less than 100 cents on the dollar paid. The procedure Mr. Zwaig is talking about is the procedure for an extension arrangement.

Senator Flynn: That is not too bad.

Mr. Swaig: The creditors, however, have a vote, either in person or by proxy, at a meeting of creditors called to consider the arrangement by composition. The proof of claim, duly completed by the creditor, must be filed with the administrator at least one clear day before the date fixed for the meeting of creditors, so that in fact this proof of claim must be in one clear day before, whereas today, under the existing act, it can be filed up to the time called for the meeting of creditors.

With an arrangement by way of composition, where the creditor will receive only a portion of his debt and that portion will be paid over a lengthy period of time, the creditors have a right to vote at a meeting of creditors either in person or by proxy.

Note that the use of the voting letter, as used under present proposals, has no place in the bill. One would think that in order to minimize expense and time the voting letter would have rated highly in the new scheme. Not allowing for a procedure whereby a creditor can vote by way of voting letter attached to a claim is tantamount to ensuring that the majority of creditors will not have a say at all in the composition of the arrangement. The proposed bill foresees this lack of attendance by providing that one creditor constitutes a quorum at the meeting, and if there is no quorum present the arrangement is automatically deemed accepted.

As further insurance, if the votes of the creditors are equal—that is, if the votes for and against are equal—the arrangement is deemed to have been accepted. The chairman of the meeting, who has power to decide whether a claim should be disallowed for the purpose of voting, is the man who drew up what he considered to be the good proposal in the first place, our friendly bankruptcy administrator.

The debts due from the debtor to realty mortgage creditors are not affected by the filing of an arrangement. A creditor having an interest on a moveable property may choose to take back the moveable property in question and abandon his claim if the debtor has not paid two-

thirds of his original obligation. The creditor having a security interest in an arrangement by way of extension of time is not as fortunate, as he can opt out only if the security interest was given in the 60 days immediately preceding the date of the filing of the arrangement.

Senator Flynn: Let me stop you there. I am not too clear about this two-thirds. If I have sold a car, for instance, the purchaser has paid two-thirds but under the contract I am entitled to take the car back if he does not pay, does the law contend that I cannot do that?

Mr. Zwaig: That is correct.

Senator Flynn: Are you sure that that would be constitutional?

Mr. Baird: There are a number of problems on a constitutional basis, because in many cases the bill purports to deal with the rights of secured creditors.

Senator Flynn: This is the first.

Mr. Baird: We will come to more of them, but this is the first one we have discussed today. We are making a secured creditor, as Mr. Zwaig said, generally speaking bound by an extension arrangement, which means that if you have a lien or chattel mortgage on a car you lose your right to repossess that car, you are bound by the extension arrangement and the debtor continues to use his car.

Mr. Zwaig: I have been advised that the Province of Quebec is using the services of a well-known trustee and a well-known lawyer in the province. When I met with them on Friday at the Quebec institute meetings, that was the first question they raised, whether this is constitutional.

Senator Flynn: I doubt it very much.

Senator Haig: Senator Flynn raises constitutional questions at any meeting we have.

Senator Flynn: At least there is one of us who realizes what is going on.

Senator Walker: Touché.

Mr. Zwaig: I am sure that, under the circumstances, care will be taken by finance companies when renewing agreements and consolidating debts, as accommodation given to the debtor within the six months immediately preceding the filing of an arrangement will preclude the creditor having a security interest from opting out. In addition, a creditor having a security interest cannot repossess or realize on his security unless the security agreement is in default for reasons other than the filing of an arrangement.

The Chairman: What about in Ontario where we have a Mechanics' Lien Act? What is the position of that?

Mr. Baird: The stay of proceedings created by this type of arrangement, and also by the bankruptcy proceedings, would also prevent the filing of mechanics' liens, and would prevent a creditor who supplied material and labour from filing his lien within the proper 37-day period, and he could lose his lien rights.

Senator Laird: How about the situation where a car is repaired and the owner comes into the repair shop and says, "I want my car because of the existence of this arrangement"? Where would he stand on that? Would the fellow demand his car and get it?

The Chairman: Of course, if he had not made his election for going by the composition route arrangement he could get his car.

Mr. Baird: I think he could get his car. I had not thought of that one.

Senator Laird: That is exactly what I tought. There goes another section of the Mechanics' Lien Act.

Senator Flynn: That is a strange thing.

Mr. Baird: If a person who has a physical lien, a possessory line, loses that as well, it goes much further than I had even considered. He is prohibited, under clause 68, on page 38, from exercising a remedy against the debtor or his property or instituting or continuing a proceeding for the recovery of a debt from the debtor.

Senator Flynn: That is a funny situation. Forgetting the constitutional aspect, in order to please Senator Haig, what is the practical consequence of these changes as far as credit available to the public generally is concerned? It would change the whole set-up. Lenders will be in a very difficult position to assess their rights.

The Chairman: If a debtor is under a composition arrangement I do not see how he can have any credit.

Senator Flynn: It will affect the whole credit system.

Mr. Zwaig: It certainly will. It will have a drastic effect on the rate of interest and the creditability of a borrower. Not only that, but the finance company will want to get involved much sooner that they do, and as a result may foreclose much sooner, rather that wait for an arrangement to be filed, when it has to wait for the trustee. Let us envisage something else. Assuming the secured creditor is caught with this car, the debtor drives around with the car for three months until the arrangement is deemed in default, there is no vesting provision. At the end of three months the creditor, if the debtor is in default, will come back and then the debtor has to voluntarily put himself into bankruptcy. Imagine the damage that can be done to what we now know as secured property in that three-month period if he has no intention of ever paying.

Mr. Baird: He could make another payment and go for another three months, I think.

Senator Flynn: That is interesting.

Mr. Baird: There is a right to go to court and get the arrangement annulled; a creditor has that right. I guess if there were a constant two-month default, then a third payment, the periodic payments of that nature. The administrator has the power to give an extension of time for making the payments.

Mr. Zwaig: Yes.

The Chairman: You mean to give an extension of time, which would interfere with the right of the creditor to go to the court to have the composition annulled?

Mr. Baird: Yes. Well, I think that if the Administrator had extended the time for payment the composition would not be in default and therefore the court would not annul.

The Chairman: The secured creditors really are being made an instrument for the benefit of the debtor.

Mr. Zwaig: What in fact you are doing is penalizing the creditor that has been astute in the past and has taken

security interest. Supposedly the idea here is to treat or to assist the unsecured creditors in getting a greater realization. But I think what in fact you are doing is you are riding right into the hands of the unscrupulous debtors, to the detriment of the security creditor.

The Chairman: You are really levelling in both areas.

Mr. Zwaig: Yes.

Mr. Baird: Yes. That is a good point.

Mr. Zwaig: The creditor holding a security interest will of course have to file a claim in the prescribed form, and await the required delay, in order to get his security back. Most of the general provisions of the bill relating to proof of claim, disallowances and other rights of a trustee in commercial bankruptcy, will apply to this consumer and wage-earner arrangement.

The administrator will distribute dividends to creditors at least once every six months, from which dividends will be deducted the prescribed levy to the Superintendent of Bankruptcy. Any creditor wishing a current status report on an estate administered by an administrator will be required to pay a prescribed fee in advance to the administrator.

Once accepted or deemed accepted, an arrangement serves to set aside any bankruptcy petition pending against the debtor, or where the debtor was a bankrupt it annuls the bankruptcy order. If the debtor defaults in his arrangement, the arrangement may be annulled by a court, or if there is default for more than three consecutive months the arrangement is deemed annulled and the creditor's original rights revive. The proposed act is silent on whether a statutory bankruptcy ensues in the event of an annulment.

Although the government news releases and the "Background Papers for the Bankruptcy and Insolvency Bill" accompanying Bill C-60 emphasize the financial rehabilitation of the "consumer wage-earner debtor," the bill contains very little direction in this area. The administrator may give advice he thinks may be helpful to rehabilitate the debtor, or he may direct debtors to a designated person to prepare and arrange a budget as well as for guidance and counselling. The bill is silent on the facilities that would be available in each area to carry out this mammoth social awareness program.

There is in today's credit card society a need for relief for an insolvent "consumer wage-earner debtor" that is both simple and inexpensive to administer. The arrangement schemes included in the bill will not answer this need. In contrast, the Lacombe Law system presently in existence in Quebec and the Orderly Payment of Debts program available in certain other provinces appear to be less cumbersome and time-consuming for the creditors, for the debtor, and for the government departments administering the scheme.

It is doubtful that the arrangements as proposed will provide the necessary social relief to the debtors, or substantial financial recovery to the creditors. The debtor, having filed an arrangement, will have the social stigma of a "bankrupt", whereas the present voluntary deposit systems such as the Lacombe law or the Orderly Payment of Debts program appear to be less of a blow to the debtor's pride and credit.

Those are my comments on consumer arrangement.

The Chairman: You are next, Mr. Baird.

Mr. Baird: Honourable senators, I do not know whether it is appropriate to give a little background history of the Bankruptcy Act, but I think it might be interesting.

Until the introduction of this bill, the bankruptcy law of Canada has been based on the bankruptcy law of England.

The first law in England dealing with bankruptcy was passed in 1542 during the reign of Henry VIII. It allowed the Lord Chancellor and certain appointed officials to seize the property of debtors and to distribute it among their creditors. Originally, the word "bankrupt" was only applied to fraudulent persons and the first Bankruptcy Act was directed against such "persons as do make bankrupt" and they were defined as persons "who craftily obtaining unto their hands great substance of other men's goods do suddenly flee to parts unknown or keep to their houses not minding to pay or restore to any of their creditors their debts and duties." As you can see, things have not changed much in four hundred years.

In 1571 the Bankruptcy Act was amended to restrict bankruptcy to those who were engaged in trade. A debtor who was not in trade and who could not pay his debts was imprisoned until some person paid them for him. That is where the concept of the "debtors' prison" came from.

In 1705 a Bankruptcy Act was passed showing concern for the rehabilitation of the debtor. A debtor who had been in trade could get a discharge of all his debts, provided he complied strictly with the provisions of the statute. Failure to comply with the provisions of the statute resulted in death. For example, the penalty was hanging if the bankrupt failed to surrender himself to the court, committed perjury on his examination or fraudulently concealed his assets.

The Chairman: That was one solution!

Mr. Baird: This penalty was not revoked until 1821. After that time, the penalty was transportation to the colonies.

Senator Flynn: They cut an ear off after that.

Mr. Baird: I was not aware of that.

Senator Walker: That was just to identify him.

Mr. Baird: So we go back a long way with our Bankruptcy Act. I am always wondering whether we are populated by bankrupts.

The Chairman: Well, we are going a long way forward, too, maybe not in this bill but in our general concept of how to treat people.

Mr. Baird: There is no question about that. We have much better provisions than there were then. One has to look at the overall picture of a bankruptcy act. There are three main purposes of the Bankruptcy Act. One is to give a man who is swamped with debts a right to relief and a fresh start. We should be looking at that, to see if we accomplish that purpose. Another purpose is to allow a fair and equitable distribution of the assets amongst the creditors. We would want to think of that and see our act does do that and how it provides for the debtor's assets to be divided amongst his creditors. The third is one we have been looking at closely so far this morning, that is the procedure whereby a debtor can avoid going bankrupt and keep out of bankruptcy. We have the proposal provi-

sion under the existing Bankruptcy Act. The new act has these arrangement provisions, and they are designed generally to prevent bankruptcy, to keep a man from bankruptcy. That is a good purpose, but it must be accomplished by—

The Chairman: I do not think I would say they are designed to keep him from bankruptcy. I would say, rather, they are so designed that there are steps he may take to avoid bankruptcy, but they do not guarantee to keep him from bankruptcy.

Mr. Baird: That is so, Mr. Chairman, but it gives him relief from the pressure of his creditors, without having formally to go bankrupt.

I would like to highlight how a person goes bankrupt. Under the old act there had to be a voluntary assignment in bankruptcy. There is no real change in the new act; they call it a petition in bankruptcy.

The problem under the new act is that the terminology is going to be difficult for us to use, unless one is familiar with it. There will be problems. We know a "petition" now as a petition for a receiving order in bankruptcy, which is an involuntary procedure. They are now using the same terminology for a voluntary procedure. I would like to revert—it may be I am being conservative or old-fashioned—to the old language and use maybe the terminology of a "voluntary petition" and an "involuntary petition" to distinguish between the two types of proceedings. It is interesting to a creditor or to anyone to know whether a man voluntarily went bankrupt or whether he was put into bankruptcy by a creditor.

There is the term "proposal" used in the new act. Under the old act we have the term "proposal", but they mean two different things, with the same type of concept. We have to start learning our language all over again in order to understand what the new act is all about. "Proposal" under the existing act is a proposal by a debtor to his creditors to make an offer of so many cents on the dollar over a period of time which, if accepted by the creditors and approved by the court, is binding on all creditors and he keeps out of bankruptcy. The term "proposal" is used throughout the whole procedure. It is "proposal" from start to finish. The new act uses the term "proposal" only in the sense of an offer. An offer is made to creditors. It uses the term "proposal" with respect to an arrangement to creditors by way of an extension of time, and a proposal for an arrangement to creditors by way of composition, a proposal for a commercial arrangement, a proposal for a preventative commercial arrangement.

This language is extremely cumbersome and confusing. I would recommend abolishing the term "proposal" in the new act. By following the sequence of logic, they have equated "proposal" with "offer". A proposal is an offer by the debtor to his creditors which, if accepted, is converted into an arrangement.

I do not think that terminology is necessary. I think we can understand everything better if we just use the term, for example, "extension arrangement". It would be better if from start to finish in the whole procedure we were to use the term "arrangement". The debtor might make an arrangement. The arrangement would be approved by the administrator, and then eventually it could be carried out or annulled.

The Chairman: Instead of "extension," it might more properly be said to be a relieving or relief arrangement.

Mr. Baird: The concept is to give him immediate relief from payment but to provide for payment over a period of time.

Then we have our composition arrangement. The terminology they used to get started down this line is "proposal by way of an arrangement for composition." This is a terrible mouthful. Surely we can find a language that simplifies it and makes more sense.

The Chairman: The most apt word is "relief".

Mr. Baird: Yes. The purpose is to give the debtor relief. We have the proposal for commercial arrangement. Basically, that means it is an offer by a business man or a corporation to the creditors for relief from immediate payment of the debts. That type of commercial arrangement is made after bankruptcy. They have used the language such that if it is made before bankruptcy they call it a proposal for preventative commercial arrangement. We do not need this. It could be a commercial arrangement made before or after bankruptcy. We do not need the term "preventative." What does it prevent? It prevents a bankruptcy, but so what! I think inherent in understanding the provisions is the use of simple language.

The Chairman: Right.

Senator Macnaughton: It prevents our understanding. It transfers the burden to the bureaucracy.

Mr. Baird: We try to avoid that, sir, if we can. There is no justification for using different terminology for a commercial arrangement before bankruptcy or after bankruptcy. The same procedures are followed. The only difference is that one is made by a bankrupt company or individual and the other is made before he goes bankrupt.

These are just suggestions for simplicity.

We have the term "bankruptcy order" used instead of "a receiving order in bankruptcy." I think this is an improvement in terminology.

Senator Flynn: Yes.

Mr. Baird: In common law provinces we have the term "receiver" applying to cases where a secured creditor applies to have a receiver appointed for the purposes of realizing on the assets subject to the security.

The Chairman: That provision may be in the security itself. It may be in the debenture, in the trustee, in the conditional sale agreement or in certain types of liens. There is a combination of uses for that word.

Mr. Baird: That is right. I think abolishing the term "receiving order" for bankruptcy procedure is a good suggestion, because it is confusing. To call it a bankruptcy order tells everybody exactly what it is.

With respect to the word "petition," I think we should call it either a "voluntary petition" or an "involuntary petition," if we are going to use the term "petition" in order to clarify exactly what type of procedure is followed.

We have discussed the official receiver being converted into an administrator, so I will not cover that again.

We have talked about the use of federal trustees. How does a man go bankrupt? I mentioned the voluntary petition. That is fine. The involuntary petition—there is very little change in the concept of a creditor filing a petition in bankruptcy.

The Chairman: It is simple to answer your question. He goes bankrupt because he spends more than he has.

Mr. Baird: Yes, he does. The procedure for a creditor to file a petition in bankruptcy has not really changed. The new act abolished the archaic concept of an act of bankruptcy and permits a creditor to file a petition if he can prove that the debtor was insolvent and that there was an unsecured liability owing to the petiotioning creditor of $1,000.

Senator Flynn: What is the definition of "insolvency" then?

Mr. Baird: Normally, we rely on failing to meet liabilities generally as they fall due as the act of bankruptcy for most bankruptcy petitions. They are using the term "is insolvent" or "unable to pay his debts."

I do not know whether the term "insolvency" is defined in the new act. Under our procedure for filing a petition in bankruptcy in Ontario there is no opposition to the petition if the debtor does not dispute the proceedings.

The Chairman: "Insolvency" is defined in clause 5 on page 9.

Senator Flynn: Yes. It reads:

> For the purposes of this Act, a person is insolvent where the property of the person, if it were realized at a fair valuation, would be insufficient to pay all the certain and liquidated debts of that person whether or not the debts are due.

It seems to me that that could create a problem.

Mr. Baird: To file a petition, though, they have said that he must be insolvent and unable to pay his debts, in the requirement for the filing of a petition in bankruptcy.

The Chairman: Is this a convenient point at which to break?

Mr. Baird: Yes.

The Chairman: We have had a long run at it this morning. I wonder whether we should adjourn now and resume at two o'clock, or plan to come back later than that. Perhaps we could plan to sit at that time for an hour. Would you be available, Senator Flynn?

Senator Flynn: I doubt it, but what is left for these witnesses today? What did you have in mind for today?

The Chairman: Well, we would not finish, in any event. Would you care, Mr. Zwaig or Mr. Baird, or both of you, to project, as it were, precentagewise, or in any other way, the important headings that we still have to deal with?

Mr. Baird: Yes. I think I have some headings that I could mention. I was going to deal with the effect of bankruptcy on a secured creditor, dealing first with the stay of proceedings created by the filing of the bankruptcy. Secondly, I was going to deal with the fact that wage earners are now being given a priority of $2,000 over all secured creditors, including a mortgagee of land, and that is a drastic change. In addition, there is the trustee in bankruptcy having the right to get involved in realization by a second creditor, though that is not quite as drastic as the other provisions. I was going to deal also with what assets are exempt from execution, and therefore not available to a trustee in bankruptcy under the new act. I was going to deal with what debts were released by the bankruptcy proceedings, under the old act—debts for fraud—and necessaries are not discharged. Under the new act, debts incurred as a result of fraud will be discharged. This is an important change.

I was going to deal with the procedure for the discharge of a bankrupt. I was going to refer to the new provisions relating to the liability of officers and directors of corporations.

There are very significant changes in the new act relating to officers and directors. They can be made liable for the difference between the assets and the liabilities of a bankrupt company. They can have the status of a bankrupt imposed on them. If the corporation goes bankrupt the directors of the company can have the status of a bankrupt imposed upon them, and they would be under the same restrictions with respect to incurring credit and carrying on business and managing corporations, as an individual bankrupt would be. This is a very significant change in the new bankruptcy act.

I was going to deal with the conflict of interest provisions. Mr. Zwaig has talked about these very briefly. There are statutory provisions involving conflict of interest.

The Chairman: At that stage, if anybody wanted to read the provisions on conflict of interest I could refer him to the sections and the pages. This information is right, I think, Mr. Baird. In Part I there is section 4, page 8, for example.

Senator Flynn: Mr. Chairman, what has been done with regard to secured creditors is a very good model for the committee to work on. I do not know if the same thing could be done for other topics, like conflict of interest, and so on, and possibly other areas that have been mentioned. I think we would save time by, let us say, adjourning to next week and possibly having our experts prepare a few things of that kind.

The Chairman: Yes. I think maybe you are right, because I am still getting back to my original point, that we can overload, and some of the points sort of fall out of place. We have had quite a run at this this morning. The statement you have on the position of secured creditors is very good.

Senator Flynn: Thai is what I say. If we could have something like that, it would be excellent.

The Chairman: In the meantime, if some of the other points could be developed in that fashion, and if they were available before next Wednesday morning, we could distribute them. If not, you will have them before you and you can follow much more readily.

Is that a practical thing for you to do, Mr. Baird?

Mr. Baird: Yes; no problem.

Mr. Zwaig: There is no problem for me either.

The Chairman: In the list that Mr. Baird gave just now there are some very important headings, and very important and significant changes in the law.

Senator Flynn: That is right.

The Chairman: I cannot over-emphasize that point. It is factual, if you look at the provisions of the bill. It will be easier to look at them and acquire a familiarity if we do that.

Senator Flynn: And we can propose solutions or changes if we deem it advisable.

The Chairman: I did not ask you, Mr. Zwaig. You have certain important clauses that you are going to deal with as well, I think.

Mr. Zwaig: Mine will dovetail now into what Mr. Baird has indicated.

The Chairman: Perhaps it is important that we should adjourn at this time, and not plan to sit this afternoon, but rather, to sit next Wednesday morning, which will make a lot of the additional presentation easier and more efficient. It may be a quicker or more expeditious way of getting through the important clauses of the bill.

I should say that as far as submissions are concerned we have been notified by the Chartered Accountants Association and by the Toronto Board of Trade, both of which organizations have always submitted excellent briefs, that they are working on their briefs but cannot possibly be ready before the last week in June. We would want those briefs, in any event. Then the Canadian Bar Association needs more time, and the Canadian Bankers' Association have notified us that they need time also.

My thinking, therefore, is that we are getting educated in the meantime, and we may decide, if the committee thinks it appropriate at this time, to hear some of the departmental officers, although my personal preference would be not to hear them until we have had the submissions.

Senator Laird: I agree with you.

The Chairman: So what I suggest now is that we adjourn until next Wednesday morning.

Senator Flynn: You were worried last night, Mr. Chairman about not using the full day of your experts; but I am quite sure they can find a lot of work to do this afternoon if they want.

Senator Macnaughton: May I take the opportunity, on behalf of the committee, of congratulating you, Mr. Chairman, on selecting these two experts? They were clear and interesting, and I think it was an excellent morning.

The Chairman: You know we have always had real experts as our advisers, and we have not fallen below that standard in our choice this time.

We will adjourn, then, until next Wednesday morning at 9.30. We may have to intervene at some time during the day on this bank bill, but I have told them that even though I said we would hear them some time next Wednesday, public bills always have priority. So, subject to that, we stand adjourned, and you will keep the material you have. If we have any additions to make to it, we will distribute them.

The committee adjourned.

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1974-75

THE SENATE OF CANADA

PROCEEDINGS OF THE

STANDING SENATE COMMITTEE ON

BANKING, TRADE AND COMMERCE

The Honourable SALTER A. HAYDEN, *Chairman*

Issue No. 41

WEDNESDAY, JUNE 11, 1975

Second & Final Proceedings on Bill S-24, intituled:

"An Act to incorporate the National Commercial Bank of Canada".

REPORT OF THE COMMITTEE

(Witnesses: See Minutes of Proceedings)

29172—1

THE STANDING SENATE COMMITTEE ON BANKING, TRADE AND COMMERCE

The Honourable Salter A. Hayden, *Chairman*

The Honourable Senators,

Barrow	Hays
Beaubien	Laird
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Gélinas	Sullivan
Haig	Walker—(19)
Hayden	

**Ex officio* members

(Quorum 5)

Order of Reference

Extract from the Minutes of the Proceedings of the Senate, May 27, 1975:

"The Order of the Day being read,
With leave of the Senate,

The Honourable Senator Hays, P.C., resumed the debate on the motion of the Honourable Senator Hays, P.C., seconded by the Honourable Senator McIlraith, P.C., for the second reading of the Bill S-24, intituled: "An Act to incorporate the National Commercial Bank of Canada".

After debate, and—
The question being put on the motion, it was—
Resolved in the affirmative.

The Bill was then read the second time.

The Honourable Senator Hays, P.C., moved seconded by the Honourable Senator McIlraith, P.C., that the Bill be referred to the Standing Senate Committee on Banking, Trade and Commerce.

The question being put on the motion, it was—
Resolved in the affirmative."

Robert Fortier,
Clerk of the Senate.

Minutes of Proceedings

Wednesday, June 11, 1975
(55)

Pursuant to adjournment and notice the Standing Senate Committee on Banking, Trade and Commerce met this day at 9:30 a.m. to further consider:

SUBJECT: Bill S-24—"An Act to incorporate the National Commercial Bank of Canada".

Present: The Honourable Senators Hayden, (*Chairman*), Beaubien, Buckwold, Connolly (*Ottawa West*), Cook, Desruisseaux, Flynn, Hays, Laird, Macnaughton, McIlraith, Molson and Walker. (13)

In Attendance: Mr. R. L. du Plessis, Legal Adviser to the Committee.

WITNESSES:

Inspector General of Banks:

Mr. C. L. Read.

National Commercial Bank of Canada:

Mr. W. H. McDonald, provisional chairman; and
Mr. G. Howard Eaton, provisional president.

National Trust Co.:

Mr. S. F. M. Wotherspoon, Q.C., Counsel.

Bank Canadian National:

The Hon. Lionel Chevrier, Counsel.

Mr. McDonald and Mr. Eaton proposed three amendments to the Bill which would have the effect of changing the name from the National Commercial Bank of Canada to the Canadian Commercial and Industrial Bank.

Upon motion of the Honourable Senator Hays, it was *resolved* to amend the Bill as set forth by Mr. McDonald.

Upon motion of the Honourable Senator Hays, it was *resolved* to report the said Bill as amended.

NOTE: (the full text of the above amendments appears by reference to the Report of the Committee immediately following these Minutes).

At 11:10 a.m. the Committee proceeded to the next order of business.

ATTEST:

Frank A. Jackson,
Clerk of the Committee.

Corrigendum: Issue No. 39 should be dated June 4, NOT June 11, 1975.

Report of the Committee

Wednesday, June 11, 1975

The Standing Senate Committee on Banking, Trade and Commerce to which was referred Bill S-24, intituled: "An Act to incorporate the National Commercial Bank of Canada", has, in obedience to the Order of Reference of May 27, 1975, examined the said Bill and now reports the same with the following amendments:

1. *Page 1:* Strike out lines 26 to 28, inclusive, and substitute therefor the following:

   "of Canadian Commercial and Industrial Bank and the French name of Banque Commerciale et Industrielle du Canada, hereinafter called"

2. *Page 2:* In Clause 5 strike out "National Commercial Bank of Canada" and substitute therefor the following:

   "Canadian Commercial and Industrial Bank"

3. *Page 2:* In clause 5 strike out "Banque Nationale de Commerce du Canada" and substitute therefor the following:

   "Banque Commerciale et Industrielle du Canada"

4. *In the title:* Strike out "National Commercial Bank of Canada" and substitute therefor the following:

   "Canadian Commercial and Industrial Bank".

Respectfully submitted,

Salter A. Hayden,
Chairman.

29172—2

The Standing Senate Committee on Banking, Trade and Commerce

Evidence

Ottawa, Wednesday, June 11, 1975

The Standing Senate Committee on Banking, Trade and Commerce, to which was referred Bill S-24, to incorporate the National Commercial Bank of Canada, met this day at 9.30 a.m. to give consideration to the bill.

Senator Salter A. Hayden (*Chairman*) in the Chair.

The Chairman: We have a busy day ahead of us, with the bank bill this norming and the continuation of the educational session on the bankruptcy bill. If we have any time left, our advisers and your chairman would like to report to the committee *in camera* on our discussions with the advisers in the other place with respect to Bill C-2. I think it is important, so that if we do not finish today I have reserved tomorrow morning at 9.30. I thought I should tell you that now.

Senator Walker: Are we sitting at 2 o'clock this afternoon, Mr. Chairman?

The Chairman: Yes; that is what the motion last night provided.

We have before us, first, Bill S-24. Mr. McDonald is present and will present a statement and introduce the group of people with him. They are all, I understand, provisional directors of the proposed bank. We held a short hearing a week ago on the question of the name. Mr. McDonald will tell you, but my understanding is that they have settled on a name. There will be an amendment proposed during the course of this hearing. The name does not appear to be objectionable to any person. Now Mr. McDonald, will you please pick up the ball?

Mr. W. H. T. McDonald: Thank you, Mr. Chairman: Honourable senators, before I introduce the provisional directors, I might mention the name, which is Canadian Commercial and Industrial Bank. In the French language, if you will excuse my French, it is "la banque commerciale et industrielle du Canada". This was the name mentioned during the hearing last week. We do not believe that this name will conflict with any other bank or financial institution. We have discussed the name with the Inspector General of Banks, who did not indicate an opposition to its use. We took the precaution of discussing it with the Canadian Imperial Bank of Commerce and are authorized to report to you from its chairman that it does not object to the use of the name. We are, therefore, asking that the name be granted to us. During my remarks I will use the name "The Canadian Commercial and Industrial Bank".

Senator Connolly: Could I inquire, Mr. Chairman, whether the name has been cleared with the officials of the Department of Consumer and Corpporate Affairs?

Mr. McDonald: Yes, sir, it has; we have searched the name and did not find any opposition there.

Senator Cook: There was another concern which objected. Has that objection been withdrawn?

The Chairman: Those who appeared last week, Mr. Chevrier, on behalf of the Banque Canadienne Nationale and Mr. Wotherspoon, who appeared on behalf of National Trust Company, I undertook to have advised as to the change in name. I see Mr. Wotherspoon is present this morning and take it that he has no objection from the point of view of the National Trust Company.

Mr. S. F. M. Wotherspoon, Q.C., Legal Counsel, National Trust Company: No; our objection to the name is removed.

The Chairman: I do not know whether there is anyone here this morning representing Mr. Chevrier, or the Banque Canadienne Nationale. In any event, they have been advised and their concern was the inclusion of the word "National". The concern from the point of view of the sponsors of this bill was that the name that they had thought of might create some conflict when using the initials in connection with the Canadian Imperial Bank of Commerce, because they were proposing the Commercial Industrial Bank of Canada. They have therefore finally settled that with the Canadian Imperial Bank of Commerce and have reached this name, the Canadian Commercial and Industrial Bank. Therefore, any difficulties or objections that we know of seem to have been removed. Of course, if they encounter trouble with this name, they will have to face that subsequently. This is their representation, though, and this is their name and we have received no protests with which we have not dealt. Go ahead, please, Mr. McDonald.

Mr. McDonald: The first provisional director I will mention is Mr. G. Howard Eaton, sitting beside me. He is 40 years of age; his early education was obtained in Vancouver where he grew up. He now resides there. He obtained his Bachelor of Arts degree at Oregon University. He then had two years of graduate schools study at the International Economic School of Banking. For two years he was with the Bank of America, as an officer in the International Banking Division, with service overseas. He then joined Adlum Brown, T.B. Read Ltd., of Vancouver, and was manager of the money market operations there for two years. From August 1969 to January 1974 he was Executive Vice-President of the Bank of British Columbia. He was President and Trustee of the B.B.C. Realty Investors and held similar posts in other subsidiaries of the Bank of British Columbia. His most recent experience, for about one year, has been as president and chief executive officer of a financial company with headquarters in Vancouver. Should we be granted a charter, Mr. Eaton will become the President and Chief Executive Officer of the new bank.

The next provisional director is Mr. Albert V. Hudon. He was born in 1932—

The Chairman: Wait a minute, please; I do not think we will need to go into the biographical sketches of all the provisional directors. We can assume, as is said somewhere in a quotation, that they are all honourable and capable persons, or they would not have been selected by you as the provisional directors. If you will introduce them and have them stand up, we will have a look at them.

Mr. McDonald: Thank you, Mr. Chairman. Mr. Hudon, would you rise please? I can assure you that all these gentlemen are competent and—

Senator Hays: Healthy.

Mr. McDonald: And healthy. Mr. W. E. Scott, from Manotick, Ontario, who is a former Inspector General of Banks, is also a provisional director.

Senator Walker: Are these just the provisional directors, or which ones of them do you anticipate will become permanent directors?

Mr. McDonald: We would hope that they all will be. The next is Mr. Graham H. Walker, from Regina, Saskatchewan, President of Houston, Willoughby and Company. Then there is Mr. John T. DesBrisay, Q.C., senior partner in the law firm of Cassels, Brock in Toronto.

Senator Walker: That is a great advantage.

Mr. McDonald: Finally, myself; I am Vice-President of Boyd, Scott and McDonald Limited and have been involved with our company since 1966. Our company is the sponsor of the bank proposal. The shareholders of our firm are Mr. Michael Boyd, who is present this morning, myself, two investment companies, Edper Investments Limited and Duke Seabridge Limited and a Texas-based mortgage banking company called Lumberman's Investments Corporation has a small interest. There are two Canadian pension funds, Houston, Willoughby Limited and the Aluminum Company of Canada. Several members of our management group are included.

I would like to say a few words about our background and endeavour to explain why we feel that our company is qualified to sponsor a new Canadian bank. As individuals, we were involved in the formation of several new companies. The Mortgage Insurance Company of Canada was incorporated by private bill in 1963 to provide private mortgage insurance in Canada. Its original shareholders include a number of the major trusteed pension funds. Central Covenants Limited, which is now Scotia Covenants Limited, was incorporated to hold a part of the mortgages insured by the Mortgage Insurance Company. Central Covenants is now a more normal mortgage company, with assets of $123 million. The Mortgage Insurance Company of Canada is now insuring mortgages at the rate of $2 billion per year and has become a very big insurance company. Markborough Properties is also a company in the establishment of which we were involved in 1965 and by last year it had assets of $133 million. It assumed an important role as a public real estate company. In 1964 Boyd, Stott, McDonald started and since then we have been involved in creating a number of companies in which we now retain an interest and which are innovative, new companies. Morguard Trust Company is the principal one and was started in 1966. It now has eight offices and its potential mortgages under administration are up to the $650 million level.

The Chairman: What did you mean by the word "innovative"?

Mr. McDonald: New, in a sense. It was a new idea and an innovation at that point in time. The Mortgage Insurance Company, for example, was the only mortgage insurance company in Canada when it was formed. There had been several companies insuring mortgages in the 1920s, but no mortgage insurance companies existed at the time we established it. We had to do a certain amount of pioneering to get the idea established, to get capital put together to form the company and to acquire management and get it started off, a start-up situation.

The Chairman: The mortgage insurance you are talking about is something different from the ordinary insurance put on a property that is mortgaged.

Mr. McDonald: Yes. It is not fire insurance or property protection insurance. It protects the mortgagee partly against his loss. With respect to the portfolio I just mentioned, we think it is significant to us and to our plans that $400 million of that is in Western Canada, but 75 per cent of it relates to residential mortgages, and of that $400 million in Western Canada $165 million was generated from Western Canada, so we do have a strong presence in the West.

The Chairman: If we assumed that you had a paid-up capital of $40 million, would you be confining yourself to mortgage investment, or would there be other lines of investment?

Mr. McDonald: Mortgages of this kind would represent only a very small part of the bank's asset structure. To the extent that the bank would be involved in mortgages, they would probably be shorter term mortgages on construction and bridging financing, that kind of financing. I was developing this to give you a background to our company and what it has been doing, and to show you the broad interests of Boyd Stott, McDonald Limited, to support our contention that our background makes us capable of developing a new bank.

The Chairman: You are developing your experience as a qualification for getting this bank incorporated.

Mr. McDonald: Yes.

Senator Beaubien: The amount being subscribed at the moment is $22 million?

Mr. McDonald: Yes.

Senator Beaubien: Not $40 million?

Mr. McDonald: The $40 million is authorized capital and we are asking for a subscription of $22 million.

Senator Beaubien: Is that subscribed?

Mr. McDonald: It is not subscribed yet.

Senator Beaubien: But you have great hopes it will be?

Mr. McDonald: Yes, expectations. There is one other thing I might mention, because it comes in again about the bank. That is the technology area that our company has been involved in. We have a 20 per cent interest in a company that is developing a new textile technology. We own patents to a new identification system, and we have

an interest in a company involved in some new transportation ideas and patents.

Senator Connolly: What do you mean by an identification system?

Mr. McDonald: It is done by an electronic scan of the palm of the hand.

Senator Connolly: Identifying individuals, persons?

Mr. McDonald: Yes. It will have use, we feel, in the credit card field and the security field, and be an improvement on present methods of identification.

Senator Laird: Better than fingerprinting maybe?

Mr. McDonald: Yes, sir. Fingerprinting has a certian stigma attached to it, and we feel the public will resist that.

The Chairman: If you are asking for an authorized capital of $40 million and expect to have $22 million subscribed, where is the money coming from to make use of the talents in investment and organizing new business, and so on, that you have told us about?

Mr. McDonald: Because of the nature of the bank we are proposing, we will not have an extensive branch system, and therefore not an extensive retail or consumer type deposit-gathering system. This bank will operate on the money markets, in effect buying deposits, and probably have a little longer term to them than the traditional banks will have. That will be the main source of the bank's liabilities, and the assets will be matching them; that will be the source of the money.

The Chairman: You mean the nature of your deposit financing would be what we call term deposits?

Mr. McDonald: It would be more heavily loaded in favour of term deposits than the present chartered bank system.

The Chairman: And no set-up by which you receive deposits from the general public?

Mr. McDonald: No, not in the sense of a retail-consumer oriented branch system.

The Chairman: What branch system do you contemplate then?

Mr. McDonald: Branches in the main cities, the main economic areas of the country. In maturity, probably 15 or 20 branches would be what we would be looking for. I was going to deal with the subject of the branches in a minute or two, because we have the updated figures. A question was raised on second reading of the bill about the 1973 and 1974 figures. I have them available. I could give them to you in a moment.

Senator Cook: You would, however, take deposits from the public if they wanted to make them?

Mr. McDonald: Yes, we would.

Senator Cook: You would have.

Mr. McDonald: Yes, we would do a full range of banking business. It is the philosophy we are talking about.

Senator Connolly: You say you will take deposits from the public. You have spoken about a small number of branches. Would you contemplate extending to the point where you would go into the retail business, as you describe it?

Mr. McDonald: No, sir, we do not plan on doing that.

Senator Connolly: In other words, the deposits that are made by members of the public would be merely incidental to the work of the bank?

Mr. McDonald: Yes, sir.

Senator Connolly: You would do it because you are a bank?

Mr. McDonald: Yes.

The Chairman: I am not sure it would be merely incidental. As I understand it, the type of deposits you would propose to handle would be what we know as term deposits. That is, it might mature in three months, six months, a year, five years, similar to business the banks and trust companies do now.

Mr. McDonald: Yes. Under the charter we would have power to take all the deposits that banks are now taking. What we say is that we visualize a bank that is a business type bank, a wholesale type bank, rather than a consumer oriented bank, or a retail type bank, if you want to use that term. We have looked at the present bank system, and we have seen that banks are big and powerful, they have been very successful and have extensive branch systems. At the end of 1974 there were almost 7,000 branch banks in Canada. We have looked at the population per branch in Canada and compared it to that in the United States. In 1973 there were 3,329 per branch in Canada and 4,953 in the United States. In 1974 the figures are similar, 3,287 in Canada and 4,754 in the United States. The assets per branch bear a similar relationship. We have concluded that Canada does not need more branch banks. For one thing, it would be very costly to create them today, given real estate and administrative costs. We do not believe that such a new bank started today is likely to be very successful because of that, so what we are looking towards is a degree of specialization in Canadian banks.

The Chairman: Do you think, having regard to your description of the nature of the operations that will be carried on, that the name you have chosen is adequate and covers the operations, or is the name not suggestive of a bank that would exercise all the facilities that are permitted under the Bank Act?

Mr. McDonald: That was one of the reasons why we wanted to keep the word "Commercial" in our name. We felt that the bank would be oriented towards the commerce of the country an be a bank for businesses, small businesses, medium-size businesses, and industries. It is to be a national bank. This is what got us on that name kick, which we are now off. We felt that those words did indicate the type of organization we hoped to be, as distinct from a consumer oriented bank that has branches in the residential areas and shopping centres everywhere throughout the country.

Senator Macnaughton: You have the word "Industrial," which is even more so.

Mr. McDonald: Yes, we have the words "Commercial" and "Industrial" which we felt tended to shift the thought in that direction.

Senator Connolly: I do not ask this to have a long discussion about it, but would you indicate the difference between the operation you conduct and the operations conducted by the acceptance companies, who do the kind of work, as I understand it, in some respects that you contemplate?

Mr. McDonald: There will be similarities with some of the acceptance companies, yes. There will be some similarities with, say, RoyNat, that kind of term lending operation. We hope to go beyond that. I think the closest comparable organization we will come to is the Mercantile Bank of Canada, which also has few branches, one branch in each of the main cities; it tends to specialize in areas that are in accordance with its business philosophy, and it does not have a big retail or consumer branch system. I would think that we would be closest to them.

Senator Connolly: You would be competing with them, but you would in a sense be competing with the regular banks, the chartered banks, and also with the acceptance companies, and probably the loan companies too.

Mr. McDonald: To a degree. Also we will be competing with the so-called "suitcase" banks, the Canadian operations of foreign banks, which operate in the term lending field and in the business loan field. We will definitely be competing with them.

Senator Connolly: Could you describe this as a merchant bank?

Mr. McDonald: It would have some characteristics of a merchant bank, yes. To the extent that we would become involved in helping new businesses to become established we could take on the characteristics of a merchant bank, yes.

Senator Connolly: Is that an underwriting operation?

Mr. McDonald: No, not underwriting so much as financing start-up situations or financing acquisitions.

Senator Connolly: With security?

Mr. McDonald: With the normal bank approach to it. Our philosophy is that if we orient ourselves into the business area, the business community, and attract people who do have real sound lending talents and business development type talents, and we give them an opportunity to concentrate in that area and do not distract them with the problems of administering a big branch system or solving all the problems attendant on very high levels of staff; by that form of concentration they will be able to do a good job and make this bank profitable, operating in that area.

Senator Macnaughton: This may be naive, but you have spoken of term and loan banking business, and if I understood your implication in an earlier statement, you said it would be longer term than the average Canadian bank.

Mr. McDonald: I was referring to the deposit side. It will be a bit longer on the deposit term side on average.

Senator Macnaughton: Would you say the average is about three years, perhaps renewable?

Mr. McDonald: I would say with the current banks the average is probably much less than that.

Senator Macnaughton: Did you have any term in mind?

Mr. McDonald: No. It would depend on money markets and the relationship with the cost of money. It would also relate to the build-up of the asset structure and the balancing of the asset and liability structure. These would fix the actual average term in practice.

Senator Macnaughton: Of course, that is always true, but when you speak of longer term I am just wondering what you have in mind.

Mr. McDonald: Perhaps I could turn that question over to Mr. Eaton, if I may. He could deal with the matter of the term of deposits, balanced with the term of assets.

Mr. G. Howard Eaton, Provisional President, Proposed National Commercial Bank of Canada: Probably to develop the characteristic of the asset side, it is our thought that the bank would concentrate or various forms of lending, partly what would be described as short-term lending, which would be extensions of credit to accounts receivable, inventory financing, general working capital requirements. In going beyond that kind of thing, getting out into what would be described as medium and term financing, you would find loans which would have a maturity of anywhere from two to eight years long, for example. To a certain extent that would be competitive with what you would find in Roy Nator some of the acceptance and loan companies. These kinds of loans would be developed on the asset side, so you would have first mortgages on a man's plant, equipment and land. The reverse of that would be to fund yourself properly so that the bank's liquidity and performance would not be impaired through any particular economic cycle. You would seek to develop a deposit base which would reflect the term of those loans. To the extent that you had short-term loans in your portfolio, you rely on the short-term loan market from day to day, with the short-term certificate market.

On the other end of the scale, you would go out, like the trust industry does, and buy five-year money—five-year term certificates—and try to balance that off.

Senator Connolly: The security that you take would be in the form of mortgages on land and real estate generally, and chattel mortgages. That kind of security?

Mr. Eaton: Yes.

Mr. McDonald: Any kind of security which the banks are now taking, we will do the same. Also Section 88, security.

Mr. R. L. du Plessis; Legal adviser to the committee: It is still section 88.

Senator Hays: Do you anticipate that you would be generating deposits from offshore to any degree?

Mr. McDonald: I think initially the answer is to a very limited degree. We have said that we plan the bank to be a national bank with international interests. Having a safety valve by being able to go into international money markets is a real asset, This will come about. So the answer is yes, but probably it will take a little time to develop the strength for a new bank to operate in international money markets.

Senator Walker: This is all part of your philosophy, but you haven't any plans for that yet?

Mr. McDonald: Yes, we have plans to do it. I am saying it will take time to give the bank the credibility it will need to operate in international money markets.

Senator Buckwold: First of all, may I declare myself as having an interest in another chartered bank, and therefore I will not vote on this. I want to talk about Air Canada and CN pension funds. In common shares, they would have 22.2 per cent between them.

Mr. McDonald: No. The 22.2 percent is the share they hold in our company.

The Chairman: They are shareholders or will be?

Mr. McDonald: They are a part of Boyd, Stott and McDonald Limited.

Senator Buckwold: Are they investing anything in the bank itself?

Mr. McDonald: We have been discussing it with their pension funds—the pension funds of those two companies. We have approached them, as well as some 23 other pension funds with whom we have done business over the past eight or ten years. We have offered them a participation in the bank, as we have for the other 23. To date no one has given us a firm commitment, and neither have they. They are considering it, but that is as far as I can tell you at the moment.

Senator Buckwold: You are saying you are offering a number of pension funds the opportunity to invest in the common shares and preferred shares of this bank?

Mr. McDonald: Yes, sir, the common shares.

Senator Buckwold: Have they subscribed anything yet?

Mr. McDonald: No, they have not. Perhaps I could elaborate a little on the pension funds. We have done a lot of business with them over the years. The pension fund industry in Canada now has assets of $18 billion at the end of 1974. About 26 per cent of that was invested in common stocks. We feel that this kind of investment is a continuation of the trend of pension funds to broaden their investment basis and get into a greater variety of types of investments. We see them getting into real estate. We have been involved with them in mortgages for many years. We are aware that these funds are well managed. They have independent consultants, they have outside investment management firms which look after their interests they are usually trusteed. So that there is a separation between the fund and the company they represent.

The Chairman: In illustrating these different areas of potential investment, or potential shareholders of the bank, these are areas that you will explore and, you hope, successfully. You have had contacts with them in Boyd, Stott and McDonald and you hope that may enable you to develop their interest in this bank?

Mr. McDonald: Yes.

The Chairman: You are not urging anything more than that. Do you have any assurances as to particular pension funds that will invest certain moneys in the shares of this bank?

Mr. McDonald: We have been given very good encouragement from the funds. Their role is as investor and they would not want to be put into the role of a sponsor, which is our function. We believe that if we are granted a charter they will commit the capital to come in. One thing that is significant about this is the fact that of the funds we are discussing, or will discuss, the assets represent the savings of about 500,000 Canadians. Those assets are very big and the funds, in total, represent a very big investment pool of capital.

Senator Molson: Is there any thought of going public with this bank?

Mr. McDonald: I feel that we should leave that decision up to the pension funds and the institutions that are the initial shareholders of the bank. Because there are some new features about the bank, we did not feel that we should immediately bring in the public. They might not understand the differences between this bank and the other banks. We felt that decision would be made in the future, and it would be up to pension funds and the institutions as to whether they wished to make it.

Senator Molson: You are sponsoring and managing it. Is it in your plans to do it?

Mr. McDonald: No. We felt that if the bank was successful and it was operated soundly, we could see no reason why the pension funds would want to broaden out their shareholding base and bring in other shareholders. But there would be nothing to prevent them from doing so.

Senator Cook: Are there not restrictions on trustees or pension funds investing substantial funds in shares which have no dividend record, and that sort of thing?

Mr. McDonald: Yes, there is a provision in most of the pension benefits standards acts which these funds are all subject to. Because it is not a dividend paying stock it does not go into their regular pool of investments. It goes into what they call their basket clause, which is a provision which enables them to make this kind of investment. That is the kind of investment this will be.

Senator Beaubien: Mr. Chairman, you have always recommended that we grant a charter to a new bank provided two points were added which they looked for. The first was honesty—people who looked as though they were honest and could properly run a bank. Looking at the provisional directors, I think we could be satisfied on that point. The other point is adequate finance. On that point we do not seem to be getting anywhere very quickly. First of all, $22 million is peanuts. If you are going to start a new bank, $22 million, to my mind, is completely inadequate. The second point, in connection with pension funds, is that no one can own more than 1/20 per cent of a chartered bank anyway. If you are looking to pension funds to put up the money, pension funds can change their minds tomorrow. Someone who is running a pension fund is not going to put a lot of money into a new venture of this type. Looking at the banks we have granted charters to in the last while, they have been creeping along. They have been lucky. Others have just folded up. Before we should really go into this, the question of how this thing will be properly financed should be gone into. I know the Inspector General of Banks will not grant a certificate, even if we give them a charter, until satisfied that the money has been provided. But this part is very sketchy, to my mind. It is a thing that we should look into.

Mr. McDonald: May I comment, Mr. Chairman?

The Chairman: That is what you are expected to do.

Mr. McDonald: The problem of how much capital is a difficult one. We did observe that the Bank of British Columbia got started on about $12.5 million capital.

The Chairman: Plus the aid of the provincial government.

Mr. McDonald: They did come in with a small amount eventually. But the original capital that was committed was about $12.5 million. The Unity Bank came out with a net amount to them of about $23 million—between $23 million and $24 million. We felt that $22 million was a good place to start, particularly because if the financial institutions come in, mainly the pension funds, these particular pension funds we are discussing the bank with have assets of something around $6 billion.

The Chairman: Mr. McDonald, which comes first? In the ordinary way, if you get a charter, you have subscription up to $22 million; is that right?

Mr. McDonald: When we have a charter, yes we will have subscriptions—

The Chairman: That is all the money you have at that time to carry on business with. Now we start to speculate, and we talk about the pension funds as being an excellent source for providing money. But at that stage how can you expect that the people who run the pension funds could, as a matter of law, use pension moneys to invest in the bank at that stage? How could that be a source of money in the beginning?

Mr. McDonald: It is not a source of that kind of money. We are not looking to the pension funds to provide deposit liabilities for the bank. The deposit liabilities of the bank will be bought deposits in the money market, and they will come from wherever that kind of deposit is now coming from to the existing banks. I was merely observing that if $22 million is adequate capitalization to get started, and we need additional capital later on, which would be obtained by doing what all the banks do, issueing rights to subscribe for additional shares, these shareholders have the financial assets to pick up the additional rights. If they do not choose to do so, those rights can be offered to anyone else and additional capital will come in. I am merely observing that we do have a number of very financially sound shareholders if the institutions come in.

The Chairman: My understanding on the question of banks issuing rights is that there is provision in the Bank Act where you are limited in the first instance. You have to offer the rights to the existing shareholders; is that right?

Mr. McDonald: Yes sir.

The Chairman: And to the extent that they are not taken up, they may go into a pool and institutions may underwrite them. In that way you get additional money. But you are providing for four million shares of authorized capital stock. Within the limits of four million shares, do you think a rights issue at par, or less than par—par is $10—will produce substantial moneys for the plans you are speaking of, and the attraction of pension funds?

Mr. McDonald: Yes, we do; because if the bank is successful, the rights would be automatically picked up by the existing shareholders. If it is not successful, in the sense—I am not thinking in terms of profit, but its growth—there would not be the need to issue additional capital; and the capital of $22 million could sustain the growth for a reasonable period of time. The average of the relationship between the liabilities and the equity of banks is something around 35 to one.

We are looking at, in the early phase of the bank's operations, 20 to one, which means that $22 million of capital can support $440 millions of liabilities. That should enable the bank to grow as quickly as it is humanly possible to get good assets working for us within the first few years.

The Chairman: Let us start at the beginning: You obtained your charter; $22 million is subscribed. So, on an authorized capital of $40 million, the difference is represented by unissued shares.

Mr. McDonald: That is correct.

The Chairman: Are you saying that at that stage it is good and attractive planning to make a rights issue in relation to some or all of the unissued shares?

Mr. McDonald: No; I am saying that $22 million enables the bank to attract deposits using a conservative liability-equity ratio of 20 to one, in excess of $400 million of deposits and develop $400 million of assets. On the other side. I am saying that if the bank grows faster than that, we could attract additional capital when it is needed and, because we have substantial institutions as shareholders which have regular cash flows and are growing at a very rapid rate, additional capital would be forthcoming if needed. We do not believe in having too much capital, because that can create some problems of management being too easy and freewheeling in employing that capital. Mr. Eaton and I have had many discussions as to the problems of how much capital is sufficient.

Senator Walker: Mr. McDonald, so far you have been very informative, and it is nice to hear all this. However, tell me where you will be obtaining the first $22 million.

Mr. McDonald: From the trustee pension funds.

Senator Beaubien: No; they cannot put up the $22 million in Canada.

Mr. McDonald: Yes, sir.

Senator Walker: I am suggesting to you that in view of our experience in issuing charters and the trouble involved, no pension fund will initially put up any part of that $22 million. If I am wrong, have you any assurance that they will? I do not mean philosophically, but hard cash.

Mr. McDonald: Sir, I have spent three months discussing this project with pension funds.

Senator Walker: And you are spending more time today.

Mr. McDonald: We have had discussions with the investment managers of 25 funds as to the project. In all cases, except one which invests only in mutual funds, it is an investment which they are authorized to make and which their investment philosophy enables them to make. In many cases they are making such investments every week, or every month of the year.

Senator Walker: In new chartered banks?

Mr. McDonald: Yes, because it is a basket clause investment. One of the funds, because its basket clause is full, said they like the idea of becoming involved in a new bank

because of the security of banks and banking and our new approach appeals to them, but their basket is full. We feel that pension funds, with our knowledge of them and our understanding of the industry, are a good source of investment capital.

The Chairman: Supposing we accept that, however, the point is when?

Mr. McDonald: Immediately we are granted a charter, if Parliament does grant it, we will be visiting with another 15 or 20 of these funds. We will then be able to offer them something specific. In other words, an opportunity to come into a bank which has a charter and we expect to be able to obtain the commitments of capital. As we pointed out earlier, the Inspector General of Banks is not going to issue us a licence until we have shown that the capital is available. We have discussed this pension fund approach in detail with the Inspector General of Banks over the past year and he is fully aware of it.

Senator Connolly: Did he raise any objections?

Mr. McDonald: No, sir.

Senator Walker: Just to bring this down to a point: You have no money that you anticipate investing in the initial $22 million, except that money which you expect to obtain from pension funds and you have not got that earmarked, you have not been promised that. After getting your charter, you must set out again and find that money.

Mr. McDonald: The only thing is that we have committed from our company $550,000 of capital to the bank.

Senator Walker: That is peanuts.

Mr. McDonald: To us it is not, because we are not a capital-intensive company.

Senator Walker: I am referring to the overall picture. To your outfit it may be a large amount of money, but this is a very serious business. We have seen these projects going by the board, at the expense of the pension funds.

Mr. McDonald: The only bank that went by the board was the one that had the commitment of capital in cash. The Unity Bank did not have a commitment of capital before its charter was granted. The Bank of British Columbia had a sort of comfort letter that $3 or $4 million would be available and it raised its funds after it obtained its charter.

Senator Walker: From pension funds?

Mr. McDonald: No.

Senator Walker: Do you know of any bank, at any time, which has been granted a charter and received its initial capital from pension funds?

Mr. McDonald: No, sir.

Senator Walker: I should say not.

Mr. McDonald: But the chairman asked earlier what we mean by "innovation". We feel that this is an innovation and a good one.

Senator Connolly: Mr. Chairman, when we used to consider bills of incorporation of insurance companies there was always a clause in the bill providing that, the authorized capital shall be so much and the company may commence business if X per cent of that capital is subscribed, but may not commence unless that percentage is subscribed.

Senator Beaubien: And paid in?

Senator Connolly: And paid in. Is there any such safety valve in the Bank Act? Does the Inspector General of Banks have to pass upon the proposition as to whether or not there is adequate capital for this newly incorporated bank once a charter has been issued to start operations?

The Chairman: They cannot start before they obtain the certificate from the Inspector General of Banks.

Senator Connolly: Does he pass upon the adequacy of the amount of subscription?

The Chairman: Let us get the answer right away. Mr. Reid, this certificate which you issue permits the bank to commence operations, is that correct?

Mr. C. L. Read, Inspector General of Banks: It is Order in Council which authorizes the bank to commence.

The Chairman: What do you have to be satisfied of before you approve the issue of an Order in Council?

Mr. Read: If the bank were given the right by a charter to organize a bank, which includes the raising of its capital and the setting up of its management and operational plant and so on, all of these would be looked at by my office and by government before the right to commence business would be granted.

The Chairman: You are not exactly answering my question. This particular bill provides for an authorized capital of $40 million. We are informed that what may more likely be provided in the first instance is $22 million. Now, what kind of a measuring stick do you use? If you look at the bill, it does not provide any money. Do you wait until the bank advises you that they have, for instance, $22 million paid in?

Mr. Read: The provisions of the Bank Act are, first of all, that the minimum of $1 million must be established. It also provides that if at the time of the granting of the licence to commence business subscriptions of at least 50 per cent of the authorized capital are not raised, then the authorized capital will be reduced to double the subscription. In other words, a new bank starts off with not more than 50 per cent of the authorized capital.

The Chairman: I know the Bank Act provides for $1 million. If $1 million is paid in, that seems to give them entitlement to start a bank, if they can obtain your approval. Maybe this is an unfair question and, if so, please tell me. Would you in today's market approve the issue of a charter to a bank which had $1 million subscribed and paid in?

Mr. Read: That is a difficult question, because the legislation does provide that a minimum shall be permitted. This is, of course, a minimum which was established quite a few years ago.

The Chairman: I am attempting to find out whether, if a bank were granted a charter today and came to you with $1 million of capital subscribed, would you approve the necessary authority for them to operate as a bank?

Mr. Read: We would find this rather on the small side in today's terms.

Senator Buckwold: If this particular bank indicated that it would raise $22 million as the subscription, then applied for your approval to go ahead in the banking business and, in fact, they did not raise the $22 million, but only $10 million, what would happen?

Mr. Read: One of the legal requirements is that their authorized capital would have to be reduced to $20 million.

Senator Buckwold: You would reduce the authorized capital?

Mr. Read: The other consideration which would have to be taken into account before granting an authority to commence business is the circumstances, reasons and considerations which led to their not being able to meet their objective. What these considerations would be, I do not know, but they would be taken into account.

Senator Walker: Mr. Inspector General, are you interested in how they intend to obtain the initial money at all? Does it matter to you whether it is from pension funds, or do you go into the possibility or probability of the bank being able to raise money from that source? Here we have a group applying for a charter, but the only money that they are anticipating collecting initially of the $22 million capital is from pension funds. Have you considered that and the probability or possibility of that being done, or do you not go that far?

Mr. Read: Not at this stage. Before a sponsoring group can begin to really seriously organize a bank, they must be given that right, for a start. Then one of the basic positions in organizing the bank is the status of the capital base and the subscription of capital. The basic principle in the Bank Act is to preclude any one individual or group of individuals from controlling the bank, and the 10 per cent basic minimum is there subject to exceptions. However, if they are successful in their objectives and pension funds do subscribe to their capital, there is no basic objection under the Bank Act.

Senator Connolly: Senator Walker is asking whether it is feasible to expect that a pension fund can make subscriptions to the capital of a new bank such as this.

Mr. Read: As I mentioned, they have this authority under the legislation.

Senator Connolly: They can do it, then?

Mr. Read: Yes.

The Chairman: If there is any room in their basket clause.

Senator Connolly: Oh, of course; if they have the money, they can do it.

Mr. Read: Subject to the limitations of the pension benefit standards acts.

The Chairman: It is not if they have the money.

Senator Connolly: Available for this purpose.

The Chairman: If they have the money available for this purpose in their basket clause.

Senator Walker: They would be anticipating obtaining it.

Senator Macnaughton: In spite of the law which says you must have $1 million minimum subscription, you still have ultimate discretion before you grant the certificate, you have to satisfy yourself, no matter what has been done.

Mr. Read: The government does, yes. It is an Order in Council.

Senator Macnaughton: But you advise the government of whether you are satisfied or not satisfied?

Mr. Read: That is correct.

Senator Macnaughton: So they cannot start business until you grant the certificate.

Mr. Read: All the charter does is give the sponsors the right to organize. We will examine how they have got along in the organization.

Senator Hays: Is it not right that you as Inspector General have to be satisfied, and the government has to be satisfied, that all the proposals they put forward are left up to you before you license them? You give them the charter first and then they have the licence to operate subsequent to receiving the charter, only after your approval.

Mr. Read: That is generally correct.

Senator Hays: Have you taken a look at this particular exercise, and are you satisfied that everything is in order?

Mr. Read: At this stage the promoters of this bank have kept in touch with me; I am aware of their general plans and objectives. However, we will look at it more intensely if and when they are given the authority to begin to organize the bank. That involves the charter.

Senator Hays: Do you have any objections?

Mr. Read: No objections to the proposal that you have before you.

The Chairman: Having regard to one question you put to the Inspector General and his answer, I think I should read the provisions of the Bank Act on the point:

> When, at the time of the application for the approval of the Governor in Council, a sum of less than one-half of the authorized capital stock has been subscribed.

The capital must be subscribed first before they can go to the Inspector General for permission to operate a bank.

Senator Hays: That is the licence.

The Chairman: Then it says that if less than one-half has been subscribed:

> —the Governor in Council shall, when granting the approval, reduce the authorized capital stock to the largest multiple of one million dollars that is not greater than twice the amount so subscribed, and Schedule A is thereupon amended accordingly.

I am getting at the order of steps. The Inspector General does not come into the picture until the bank has had subscribed and paid in an amount of capital; it must be at least $1 million. The $22 million represented here would appear to satisfy the requirements of the Bank Act as being an amount, if you have it in the till, with which you can come in and ask for the approval of the Governor in

Council. The question I asked earlier was what judgment the Inspector General brings to bear on the money situation today and the economics today to determine whether, if $22 million was a good amount to start with five years ago, it is a good amount to start with today. The only answer he gave was that the statute says that, and I suppose that is the only answer he has to give.

Senator Hays: It is a bit like conception, it has to start some place.

The Chairman: I would think we are more concerned, not only with the start of it but with its successful operation. If we thought it was not going to be able to operate successfully we might think twice before granting a charter.

Senator Cook: It seems to me that if we are going to exercise any discretion at all, if a good group comes in are we going to grant a charter, then they can go out and get the capital. You might have ten charters granted and ten groups, all of them good, running round the country trying to form banks. This group has apparently undertakings that if the charter is granted they can get the capital.

The Chairman: There is nothing paid in at this stage.

Senator Cook: I know there is not, but if we grant this charter we have to grant the same charter to every other group. You might have the situation where there were eight or nine groups, all good people themselves, going round the country trying to get capital to start a bank.

The Chairman: What I said was that they would have to have money paid in. Actually they would have to have the money subscribed. As I understand it, they do not have either today.

Senator Connolly: The issue of the charter really confers upon the organizers the right to go out and look for subscriptions to their company.

The Chairman: No, not entirely. If you issue a charter and then let them go and hunt for money, you require a certain amount of money to be subscribed.

Senator Flynn: That responsibility for granting a charter for a bank will be taken away from Parliament when the new Bank Act is adopted. There are provisions in the bill presently before Parliament.

The Chairman: If it passes.

Senator Flynn: I do not doubt that it will. I do not see how we can really control that.

The Chairman: You want us to anticipate that?

Senator Flynn: If it is going to be the case in six months, I do not see why we should really worry too much.

Senator Beaubien: It seems to me the point we have before us is this. The $22 million does not seem to be excessive; it seems to be small. If the sponsors can convince us that they can get at least $22 million, it seems to me we should put it through. We remember the Bank of British Columbia ten years ago. They got $23 million, and, of course, they had Mr. W. A. C. Bennett there, who was worth at least a couple of pension funds, so they had something going for them. If we can be convinced that they can get $22 million, at least to start, I think we should say, "All right."

Mr. McDonald: Last year we launched a company called the Morguard Mortgage Investment Company of Canada. It was the first mortgage investment company launched under the new legislation passed at the beginning of 1974, Bill C-135, if I recall. That legislation provided for new companies to be established that are similar to real estate investment trusts, but they are in corporate form. We went to ten pension funds located in Alberta, Saskatchewan, Ontario and Quebec and raised $20 million to launch that company. The company is now fully operative; it is making short term mortgage loans across the country, and it is into leverage by issuing debt on the company in the retail paper market. That was $20 million of capital raised from the pension funds. We did that last year when there was a very tough money market. However, it confirmed in our minds that pension funds are good sources of capital to get new things started that are of benefit to Canada as a whole. There are other companies now that are using that model as an example, and are getting established on the same basis. That is a specific example of $20 million raised in a tough market. We feel quite confident that, based on our 25 discussions to date, at the appropriate time the pension funds will come in. Pension funds are passive investors; they will not be put in a role of a sponsor of a new company; they just won't be, because it is not their nature to be.

Senator Walker: The example you have given us is entirely different. They are secured, on what you are talking about, by mortgages.

Mr. McDonald: This was the equity of the company that they came into. The assets of that company are secured by mortgages. The assets of the bank will be secured in much the same way. I am sorry, senator, but I think it is a very close parallel to what we are saying. We are saying: are pension funds a good source of capital? Can we convince you that we should be allowed to rely on this source of capital? We are saying that we did exactly the same thing last year.

Senator Walker: I do not think it is the same thing at all. You have not convinced us that you can raise the $22 million. You have not raised a cent to anticipate it. No company has said, "We are going to subscribe." It is simply a question, Mr. Chairman, that we are here today to grant a charter; I appreciate that. Perhaps we are overstepping our bounds. I suppose they have fulfilled the obligation that a charter could be granted. I am thinking of the future, particularly when they are going to try to get pension funds, and no other source. How often do we do this sort of thing, issue a charter and say, "Our hands are tied. They have fulfilled the requirements and we must grant a charter"? What we are doing this morning is going a little further than that and finding out what will happen in the future. So far, although it has been wonderful to talk about philosophy and pension funds, all the money you hope to raise is from pension funds, but not one cent has been committed yet; you cannot tell us who they are or who the other shareholders might be. I understand a group of very wealthy men are behind your bank.

Mr. McDonald: No, sir, that is not true.

Senator Walker: I was hoping it was, because they could put up some money.

Mr. MacDonald: No, because that would be inconsistent with our philosophy that pension funds are a good source of capital to start new things in Canada; they have the

money and represent the savings of a large group of Canadians, and they need to invest in higher yielding assets, they need to invest in equity situations that will help them solve the problems that inflation brings on their future liabilities. The investment philosophy of pension funds is broadening out to include this kind of investment. We feel they are the right ones we should go to.

We could have done what the Unity Bank did, which was do a survey and find enough people to say they can raise capital. They put that before you and said, "We think we can raise capital," but they did not have any capital raised. They had taken a survey and you granted, them a charter. We are saying we have talked to 25 funds; we have others we will talk to; our record is clear; we have done these things; our group is responsible; we have demonstrated what we have done; we have built a company out of nothing, and now it has $650 million of mortgages under administration all across the country. These are the things that we ask you to rely on and to say that that missing link is not a fatal one.

Senator McIlraith: It seems to me that there is no way the trustee of a pension fund can properly give a commitment to persons who are not yet incorporated. That is the essence of our difficulty. We know they have the funds available. Surely that is well enough established from what we have heard. We have a curious process in the creation of banks, in that we have to grant the charter before we can get the capital, as is the ordinary case in incorporated companies before the capital can be found. We have provided for that anomalous situation by having an inspector general of the banks and a procedure for issuing a certificate to commence business on his recommendation to the Governor in Council. Here we are trying to be assured that the capital has been subscribed. It cannot be subscribed because, by the nature of the prospective subscribers, it cannot give such a commitment, as I apprehend the law. I cannot see how they could give such a commitment with propriety.

The Chairman: Let me tell you what the statute says. It says:

> No application for the approval of the Governor in Council shall be made until directors have been elected in accordance with this Act.

I take it what we have at the moment are provisional directors, as they could only be, because there is no charter. When you come to the function of the Governor in Council, it says:

> When at the time of the application for the approval of the Governor in Council, a sum of less than one-half of the authorized capital stock has been subscribed.

So it does contemplate a subscription.

Senator McIlraith: After incorporation, but before the certificate to go into business, is there not another clause just in front of that one—I understand there is—which provides for the procedure of licensing a bank to commence operations? They just cannot commence as any other company can, from getting the charter and going through their organizational procedures.

The Chairman: When we had that rash of applications for bank charters a few years ago, the way they overcame this problem was that they sought subscriptions from individuals and companies, they used a trustee and they had trust conditions under which, if the charter were granted, those moneys had to be delivered over to the bank. If a charter was not granted within a certain length of time, those moneys had to be repaid to the people who put the money up. That is the way that was dealt with.

Senator McIlraith: But they were not dealing with pension funds. There is authority for the companies and other investors to make that sort of thing. I would be surprised if there is some authority for pensions funds.

The Chairman: That was done in the form in which I have described. They went out and sold the interest. The obligation there was that the money went to the bank if it got a charter.

Senator McIlraith: That could very well be done with the ordinary commercial or individual subscriber—there would be no difficulty—but how can that be done with a pension fund?

The Chairman: I appreciate that.

Senator McIlraith: That is our difficulty here. That is what we have to address ourselves to.

Senator Molson: Why is the financing exclusive to pension funds? Why is it exclusive? What is the objective and what is the particular merit in that?

Mr. McDonald: It is not exclusive. We have said that financial institutions, primarily pension funds—

Senator Molson: But in all your discussion today you have spoken about pension funds. You have not mentioned any other institutions. Have you had any discussions with any other institutions?

Mr. McDonald: No, we have not to date, because we have been talking only to pension funds. We have told them that if we get the capital committed by them, we do not need to go beyond them to other institutions. There is nothing magic from our point of view in that area. It is just that our company and everything we have done over the past 10 years has been in the area of financial institutions—getting them involved in mortgages and other things. So we tend to go to them, when we start something new, and if they like it and want to come into it, we feel that as old clients and friends we owe them the opportunity to be there.

Senator Molson: I understand that part of it. The other question I want to ask is, is there any real reason why any of these institutions, whether they be pension funds or other, when you discuss this bank with them, should not have given you an understanding that provided all that you set forth in your prospectus, and so on, they would intend to subscribe?

Mr. McDonald: We have been told verbally that that is so, that they accept the proposal. They like the idea and at the right moment they will put a reference through their investment committees or their boards of directors. They have told us they will be there as a subscriber in the bank. It is a problem, as I mentioned earlier, that since we are the sponsors or the proposers of the bank, it is incumbent upon us to have something that we can offer them as an opportunity. They are not promoters or sponsors. They have merely said "We will review the proposition and we will tell you whether we like it or we don't."

They fear being cast in the role of a promoter of some kind, because they look upon their role entirely as an investor. They tend to want to be more of a passive inves-

tor than an active investor. As you know, in many cases pension funds do employ trust companies and other investment managers and give them the right of discretion on their investments.

Senator Molson: Yes, but if you were putting out a bond issue, you would certainly get some understanding from a pension fund that they were going to subscribe to it.

Mr. McDonald: But at the time we did that we would be a company on which that bond would be issued, and we would have a prospectus.

Senator Molson: Well, you have a prospectus?

Mr. McDonald: Yes, but we do not have a company.

Senator Macnaughton: Do I understand the situation to be as follows: first, you are prepared, or you have or you will, or you will do it today, invest half a million dollars as an indication of good faith?

Mr. McDonald: Yes sir.

Senator Macnaughton: Secondly, you have moral commitments from funds, and perhaps other investors—which is understandable. Why should they commit themselves as sponsors until you have something to offer? After the charter is granted, if it is, you would formalize your agreements with these various funds. All of this is subject to the final authorization of the Inspector General of Banks who will not issue a certificate of banking until he is satisfied you have the money in the till.

Mr. McDonald: Yes, sir. We have kept him closely informed of all these matters over the last year and a half.

Senator Laird: Could not you get a letter of intent from any of these?

Senator Hays: Mr. Chairman, I appreciate the arguments which have been offered. In my opinion, there sould be more banks in Canada. If I might do a little philosophizing, I think it is time we looked at some of these. This is probably a new concept in Canada. It is not a new concept in other countries: the United States has similar banks; Europe has similar banks. It is going to be a sort of wholesale industrial bank. I think the Bank Act provides ample protection. There have been many charters issued down through the years since 1867. I think Mr. McDonald has the number.

Mr. McDonald: The total number of banks chartered in Canada? One hundred and sixty.

Senator Hays: Approximately 160 charters. Then there were amalgamations and so on. Now we have very few banks.

The Chairman: I have a list of them in my office. Most of those banks either failed or were amalgamated, or rescued by other banks. What we have today are the survivors.

Senator Hays: I agree with that; but in my opinion we have too few banks. I believe in free enterprise, and I do not like to see things get to the point where they may all be nationalized in one big swoop. If we had more banks, it would be good. I think of the Treasury Board in Alberta. Everyone thought it could not operate. After it operated for a while, the banks did a much better job in the province of Alberta. I saw that thing start. It is good competition today. Then we have all the near banks.

The Chairman: Senator, I have not heard anyone here today say anything in relation to the banks which are operating. We are looking at the merits of this bill.

Senator Hays: I agree with that. May I finish, Mr. Chairman? We have a good group of people here today. They are responsible people. I could have asked the question of Mr. McDonald, "How much did you start with when you started Morguard?" If we have people who are interested, like we have today, with this sort of calibre of talent, and so on, they should be given an opportunity to see what they can do.

The Chairman: No one has protested about the calibre of the people who will be behind this bank. The only point seems to be the plan which they put forward and the feasibility of that plan. I understand that was Senator Walker's position.

Senator Walker: I would like to see a new bank. The people I have seen here this morning are fine people, but none of them is putting up a cent. Oh yes, half a million. It does not matter how fine they are. We are looking to the future, to a pension fund of all things, to launch a new bank with 150 corpses lying in the pathway from Confederation on. That is all I am raising. We may not be able to stop here.

To summarize, Mr. Chairman, it seems to me that they have fulfilled their obligations in their application for a charter, but it would have been very much more pleasant if we had heard them give some more realistic approach as to where the capital is coming from in the future. But whether or not we can stop them from—

Senator Desruisseaux: Mr. Chairman, I would like to say that there is a conflict of interest in my case, because I am a director of a chartered bank. With regard to these gentlemen, I have an association in one area where some of the shareholders are also interested. Despite that, I would like to express the view that I believe, first, that the small banks have been protected by the Bank Act, that provision has been made for their existence. We have heard a number of times that there should be more small banks. Personally I do not disagree with that. I see no reason whatsoever to stop the formation of this bank on the basis that they have not yet provided all the necessary guards, because there is a safeguard provided through the Inspector General of Banks and the regulations. It provides that they cannot operate before they meet certain conditions.

As to the size of the bank, I could not care less whether they have \$20 million or \$70 million. It is the need for the bank itself, as it starts and as it expands, if if does. It will require some expansion and possibly some structural changes, when they will have to come before us again. The Inspector General seems to have given us some guarantee as to what will happen to this bank, to this application, later. I am personally satisfied that they should receive approval of their charter from us.

Senator Beaubien: Mr. Chairman, if the sponsors would definitely say that they feel they can raise the \$22 million, I am prepared to recommend to the Senate that the charter be granted.

The Chairman: Before we deal with that, may I say that it appears to me—I am only one member of the committee; I am a lawyer, and other members of the committee are lawyers—that the scheme of the act is that you can make

an application for incorporation, and the only check provided in the Bank Act is that while you can incorporate, you cannot do business without getting the Order in Council from he Governor in Council. If you fall short in the amount of money you raise in relation to the authorized capital, you go to the Governor in Council and he cuts down on the authorized capital to relate it to the amount of money you have paid in. There must be at least $1 million. That would appear to be the framework within which we can operate.

Notwithstanding that, there have been serious views expressed here about the limitations that may exist in relation to pension funds. That is a problem which those people who are looking for subscriptions will run into. I do not know that it is our particular job today to act as the guardian of pension funds in dealing with an application of this kind. That is their problem. It is also the problem of the people who are administering the pension funds. They are governed by statutes in the way in which they carry on business. Pension funds really are a pretty serious trust situation and should be carefully handled. While we may say all these things today, we then have to see the limits within which we can operate. If they come within the requirements of the statute, they are entitled to be incorporated so long as we are satisfied with the integrity of the people. So far as I and the members of the committee are concerned, we are satisfied as to the integrity of the people behind this bill and of their experience in the field of financing. They have made many things work and they say they can make this one work.

Senator Connolly: And their proposal as to how they will conduct their business.

The Chairman: That is correct. So, if we accept that part of it, I do not think we can do anything else. However, there should be a motion for amendment.

Senator Hays: Yes, amending the name.

Senator Flynn: May I say, Mr. Chairman, that you have just made the best speech ever in favour of amending the Bank Act to remove from Parliament the authority to grant charters. You have adopted my viewpoint; thank you.

The Chairman: It will be contained in the record and maybe I can explain it away.

Senator Molson: Spoken like a good lawyer.

The Chairman: It is not the first time I have had myself quoted against myself.

Senator Connolly: The fact is, Mr. Chairmam, that this committee is in a somewhat invidious position, which both Senator Beaubien and Senator Flynn have pointed out. This group appear here for a charter from Parliament and are not required under any known rule to bring in letters of intent. About the only value this exercise has is to ascertain matters as to the integrity of the group. We must to this in a very general manner and, based on that, estimate their prospects of success.

The Chairman: Maybe this is saying it a little differently: If we are satisfied with their bona fides, integrity and experience, surely that is the measuring stick we should use? I still say that if we are not satisfied with the bona fides and they appear to have some motive which they are not clearly explaining for wanting to establish a bank, we have the right to look at that.

Senator Molson: The duty.

The Chairman: And a duty, yes, and the right to say no.

Senator Connolly: And they would not last long, but the real safety lies with the Inspector General of Banks.

The Chairman: I really expect that the Inspector General of Banks reports, or maybe even recommends, through his minister and through that mechanism the Order in Council is issued.

It is moved by Senator Hays, seconded by Senator McIlraith:

That Bill S-24 be amended in the following respects:

1. By striking out the title thereof and substituting the following:

"An act to incorporate the Canadian Commercial and Industrial Bank".

2. By striking out lines 26 to 28 inclusive in clause 1 thereof and substituting the following:

"of Canadian Commercial and Industrial Bank and the French name of Banque Commerciale et Industrielle du Canada, hereinafter called "the Bank".

3. By striking out, in clause 5:

(a) the words "National Commercial Bank of Canada" where they appear in the amendment to Schedule A of the *Bank Act* and substituting therefor the following:

"Canadian Commercial and Industrial Bank"

and

(b) the words «Banque Nationale de Commerce du Canada» where they appear in the amendment to said Schedule A and substituting therefor the following:

«Banque Commerciale et Industrielle du Canada».

Those in favour of the amendment?

Senator Connolly: Mr. Chairman, could I ask one more question? I notice that the words "of Canada" and "du Canada" are being eliminated. Is there any reason for eliminating the reference to Canada?

The Chairman: They are using the word "Canadian", to start with.

Senator Connolly: I am sorry; that is correct.

Senator Molson: Mr. Chairman, before you put the question, I would like to have the record show that I am a director of a chartered bank and for that reason will not vote. If I were voting, I would be in favour of the motion.

Senator Desruisseaux: Mr. Chairman, I would say the same thing. We have been hearing on and off of conflicts of interest, but if I voted I would vote for the bill.

Senator Buckwold: Mr. Chairman, I am in the same position.

The Chairman: The chairman is not in that position, not being a director of any bank.

Senator Connolly: He is not going to vote, anyway.

Senator Hays: I hope it is not that close.

Senator Molson: You only have a casting vote.

Senator Walker: I see that Mr. W. E. Scott is a former Inspector General of Banks.

The Chairman: Yes.

Senator Walker: So he should keep an eye on them from now on.

Senator Hays: I move that we report the bill, as amended.

The Chairman: First of all, I put the amendment. Does the amendment carry?

Hon. Senators: Carried.

The Chairman: The record will record the fact that Senator Desruisseaux, Senator Molson and Senator Buckwold indicated their interest and refrained from voting.

Senator Flynn: What is their interest, Mr. Chairman? I am very curious, since we are studying conflict of interest.

The Chairman: It is conflict of interest.

Senator Flynn: Where is the conflict?

The Chairman: Senator Flynn, do not ask me; they are the ones who raised the issue.

So the amendment carries?

Hon Senators: Carried.

The Chairman: Shall I report the bill, as amended?

Hon. Senators: Carried.

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FIRST SESSION—THIRTIETH PARLIAMENT
1974-75

THE SENATE OF CANADA

PROCEEDINGS OF THE
STANDING SENATE COMMITTEE ON

BANKING, TRADE AND COMMERCE

The Honourable SALTER A. HAYDEN, *Chairman*

Issue No. 42

WEDNESDAY, JUNE 11, 1975

Second Proceedings on

"The *Subject-Matter* of Bill C-60, Bankruptcy Act, 1975"

(Witnesses: See Minutes of Proceedings)

29174—1

THE STANDING SENATE COMMITTEE ON BANKING, TRADE AND COMMERCE

The Honourable Salter A. Hayden, *Chairman*

The Honourable Senators,

Barrow	Hays
Beaubien	Laird
Buckwold	Lang
Connolly (*Ottawa West*)	Macdonald (*Cape Breton*)
Cook	Macnaughton
Desruisseaux	McIlraith
Everett	Molson
*Flynn	*Perrault
Gélinas	Sullivan
Haig	Walker—(19)
Hayden	

**Ex officio* members

(Quorum 5)

Order of Reference

Extract from the Minutes of the Proceedings of the Senate, May 13, 1975.

"The Honourable Senator Hayden moved, seconded by the Honourable Senator Bourget, P.C.:

That the Standing Senate Committee on Banking, Trade and Commerce be authorized to examine and report upon the subject-matter of the Bill C-60, intituled: "An Act respecting bankruptcy and insolvency", in advance of the said Bill coming before the Senate, or any matter relating thereto; and

That the Committee have power to engage the services of such counsel, staff and technical advisers as may be necessary for the purpose of the said examination.

After debate, and—
The question being put on the motion, it was—
Resolved in the affirmative."

Robert Fortier,
Clerk of the Senate

Minutes of Proceedings

Wednesday, June 11, 1975
(56)

Pursuant to adjournment the Standing Senate Committee on Banking, Trade and Commerce met this day at 11:15 a.m.

SUBJECT: *Subject-matter of Bill C-60—Bankruptcy Act, 1975.*

Present: The Honourable Senators Hayden (*Chairman*), Beaubien, Buckwold, Connolly, Cook, Desruisseaux, Flynn, Hays, Laird, Macnaughton, McIlraith, Molson and Walker. (13)

Present, not of the Committee: The Honourable Senator Molgat. (1)

In Attendance: Mr. David E. Baird and Mr. Melvin C. Zwaig, Advisers to the Committee.

The Committee *resumed* its examination and analysis of the provisions of the subject-matter of the above Bill, together with the assistance of the advisory staff.

At 12:30 p.m. the Committee adjourned.

Wednesday, June 11, 1975
(57)

At 2:00 p.m. the Committee resumed.

Present: The Honourable Senators Hayden (*Chairman*), Beaubien, Buckwold, Connolly (*Ottawa West*), Cook, Desruisseaux, Flynn, Hays, Laird, Macnaughton and Walker. (11)

Present, not of the Committee: The Honourable Senator Molgat. (1)

In Attendance: Mr. David E. Baird and Mr. Melvin C. Zwaig, Advisers to the Committee.

The Committee continued its examination of the above subject with the assistance of the advisory staff.

At 4:00 p.m. the Committee adjourned until 9:30 a.m., Thursday, June 12, 1975.

ATTEST:

Frank A. Jackson,

Clerk of the Committee.

Corrigendum: Issue No. 40 SHOULD NOT have the words "Report of the Committee" on the front page thereof.

The Standing Senate Committee on Banking, Trade and Commerce

Evidence

Ottawa, Wednesday, June 11, 1975

The Standing Senate Committee on Banking, Trade and Commerce met this day at 11.10 a.m. to consider the subject matter of Bill C-60, respecting bankruptcy and insolvency.

Senator Salter A. Hayden (*Chairman*) in the Chair.

The Chairman: Honourable senators, we now continue our study of the bankruptcy bill. I have distributed some additional information to you. There is a commentary that has been put out by Mr. Richard De Boo. I can tell you that the co-author of the commentary is one of our expert witnesses, Mr. Zwaig.

On the last day Senator Flynn, I think, asked if we would prepare headings and statements in line with the one we distributed last day, which had to do with secured creditors. We have done it in relation to other headings. What we are going to start out with today is the statement we left with you on the last occasion, on the position of secured creditors.

I have something else for distribution, and the question is what I should do with it. For instance, Mr. Baird will do most of the development today, with the right to Mr. Zwaig to interrupt or supplement at any moment. I have secured from Mr. Baird a schedule of the submissions that he will make in relation to the bill. I have also secured from his statements in line with the one I distributed last day. I thought that unless you think differently maybe the best way of dealing with it would be to distribute the statements at the time we are considering the particular heading, unless you think there is some advantage in having them in advance. Frankly, I think that if you had them while the witness was talking about them it would be an easier way of following and understanding. Is that agreeable?

Hon. Senators: Agreed.

The Chairman: According to Mr. Baird's schedule of submissions, which I have, he is dealing first today with secured creditors. The statement we left with you last day deals with certain portions of the secured creditors' position. I think I will turn it over to Mr. Baird and let him start in. I notice in his schedule he is going to deal with secured creditors from the following points of view: (a) the effect of bankruptcy proceedings on secured creditors; (b) rights of secured creditors under extension and composition arrangements; (c) priority of claims for arrears of wages; (d) realization of property subject to secured creditors. Those are the headings. The schedule continues developing the other headings in other parts of the bill, with which he will deal as we move along. I do not think there is any advantage in distributing that now. I think we should start into the first heading, that of secured creditors.

I had indicated that we had started to carry out the suggestion you made, and in line with the statement we distributed last day on secured creditors we now have statements on other headings, which Mr. Baird will develop. When we deal with Mr. Zwaig, who will lead next week, he will have statements in line with the one we gave you the other day. You will thus have page references and, in a summary way, the substance of what the particular clauses will do. I think that will make the understanding of the bill, and the way in which you can follow it and comment on it, much easier.

Mr. David Baird, Adviser to the Committee: Possibly, Mr. Chairman, we might distribute the first summary I have made, with respect to secured creditors under extension and composition arrangements. It ties in with the original memorandum I prepared; it fills in a void.

The Chairman: The memorandum we gave you the other day really dealt with three items. It that right?

Mr. Baird: Yes.

The Chairman: This is what we are going to explain today. It dealt with the effect of bankruptcy proceedings on creditors, priority of claims for arrears of wages, and realization on property subject to secured creditors. That is all in the memorandum you already have. We now have another memorandum, which is also on secured creditors, but it deals with the rights of secured creditors under extension and composition arrangements—Is that correct?

Mr. Baird: That is correct.

The Chairman: The first topic under secured creditors that Mr. Baird will deal with is the provisions affecting the rights of secured creditors under extension and composition arrangements.

Mr. Baird: Honourable senators, one of the most significant changes in our proposed bankruptcy bill is the treatment of secured creditors. Under the present Bankruptcy Act a secured creditor is left almost alone; he is allowed to proceed with realization on his security; there is no stay of proceedings created by either the filing of a petition in bankruptcy, the filing of a voluntary assignment or the making of a receiving order. A secured creditor can carry on, and a secured creditor, for our purposes, is a person who holds a mortgage, a conditional sales contract, a lien, a debenture, or any form of security on assets, who has security for payment of his debt; he is in the category of a secured creditor.

Under the existing Bankruptcy Act the secured creditor can carry on and is under no stay as a result of bankruptcy proceedings. There is a power under the existing Bankruptcy Act for the trustee in bankruptcy to apply to the court for a court order staying proceedings. That order is for only a limited duration of time, a period of six months

from the date of the filing of the assignment in bankruptcy or the date of the receiving order. The courts have been very reluctant to grant such an order in the past. They have required proof that the making of such on order will not prejudice the secured creditor in any way. Basically what we have had to prove is the fact that the assets subject to security are worth much more than the security, and therefore the secured creditor will be paid his principal in full and his interest, even though there is a stay of proceedings. Such an order has been relatively difficult to obtain.

The new bankruptcy bill has reversed this position entirely. Under the new bankruptcy proposals proceedings are now stayed by secured creditors, and they cannot be continued without leave of the court or other requirements being met. This means that upon the filing of a voluntary assignment in bankruptcy, even the filing of a petition for a bankruptcy order, proceedings are now stayed.

They have gone much further than the existing act. They have provided that the filing of a petition by a creditor to put his debtor into bankruptcy has the effect of staying proceedings. I think this will create a real problem, because when you have a petition for a bankruptcy order filed—the debtor has an opportunity of defending the proceedings, this defence might take two, three or four months before the final decision of the court is made making a bankruptcy order. As a result, under the present act proceedings are stayed and cannot be continued by a secured creditor.

If you are in a position of holding a mortgage on property of the debtor you cannot start foreclosure proceedings, you cannot start power of sale proceedings, you are held up. Similarly, if you have a conditional sales contract on an asset of the debtor, such a the debtor's car, you cannot seize his car because some other creditor has filed a petition to put him into bankruptcy. The effect of this will be to reduce the ability of the secured creditor to realize upon his security promptly, and thus be sure that he is able to protect the asset that is subject to his security.

Senator Macnaughton: What is the philosophy of the department behind that change?

Mr. Baird: It is a levelling philosophy; it is a philosophy of levelling the categories of unsecured and secured creditors, a concept of, in a small way, redistributing the rights and priorities. The reason behind the stay of proceedings is to give the trustee in bankruptcy an opportunity of determining what the asset is, what the securities are against that asset, and then giving the trustee in bankruptcy the right to realize on the asset to produce a maximum recovery for all the creditors.

Senator Macnaughton: Not just one?

Mr. Baird: Not just one. That is the philosophy behind it.

Mr. Melvin C. Zwaig, C.A., Adviser to the committee: I think one of the thoughts of the department, and one of their criticisms of the existing act, has always been that secured creditors do not fall within the existing Bankruptcy Act, and as a result secured creditors can deal with their security whithout in fact ever reporting to that department, giving the trustee in bankruptcy difficulty in administering, and perhaps causing him aggravation in realizing.

The Chairman: Under the present act, did not the secured creditor have to value his security?

Mr. Baird: Yes.

The Chairman: And the trustee could say to him, "Well, take it for your debt and give a release." Or he could say, "I will take it over and pay you out."

Mr. Baird: One of the problems is that the penalty for not valuing was very slight in some cases. The penalty for not valuing the security was not being entitled to a claim as an unsecured creditor in the bankruptcy. Frequently that penalty was a meaningless one, because there might be no distribution to the unsecured creditors in any event. So the secured creditor, although he is required to value his security, if he failed to do so, the penalty was a relatively innocuous one in both cases.

Senator Flynn: The trustees could force the realization of the securities—

Mr. Baird: Yes. If the creditor failed to realize on the assets, the trustee was entitled to require a realization.

Senator Flynn: If the realization brings more than the debt to the secured creditor, the assets would go to the estate of the bankrupt.

Mr. Baird: The weakness in the present act is that the secured creditor in most cases does not do anything. He just proceeds almost without consultation or knowledge of the trustee. He realizes on his security and then the trustee has to chase him. The trustee has to find out what has happened and what has been realized on the security.

Senator Flynn: You register the judgment and you can force the realization. I think it was in the old section 55 that you could arrange for the sale of the property subject to a mortgage.

Mr. Baird: That is a power given to the trustee under the present act, to require—

Senator Flynn: The trustee decides this right.

Mr. Baird: But it is a somewhat cumbersome remedy, and it has not been exercised by the trustees very frequently.

Mr. Zwaig: I think there is another underlying philosophy. The phisolophy of the act throughout is really to treat bankruptcy as the last resort solution, and that they are really promoting what we now refer to as proposal arrangements, be it consumer arrangements or commercial arrangements. They also feel that as a result of not allowing the secured creditor to realize quickly, that perhaps the trustee in bankruptcy will be able to sell the business on a going concern basis as opposed to realizing only liquidation values.

Senator Laird: If I recall correctly, when you were last here there was criticism of this proposed change. Certainly it would seem to disrupt the normal practice of business, which could be almost disastrous in the obtaining of a loan by anyone.

The Chairman: People who raise money for financing business operations and give security will have to revise their approach to the whole thing, and the cost of financing may be increased substantially because of the additional risk, having regard for the position of the trustee and the obligation of the creditor under the new bill.

Senator Cook: And the amount advanced will be reduced.

The Chairman: Yes; and the cost might be increased.

Senator Laird: It will be very disruptive.

Mr. Zwaig: And once loaned, the secured creditor will jump onto a situation much sooner than he does now. If he is worried that a payment might be in default, he might commence realization proceedings in order to beat this petition in bankruptcy proceeding that would be instituted. That is the danger of the way the bill proposes to deal with this.

Senator Laird: That is what one of you said last week. There is some inadequacy under the present setup, you have said. Surely that can be cured without this drastic change, can it not? Have you any suggestions?

Mr. Baird: Yes, it can be cured. I think there should be a mandatory requirement on the secured creditor to file a proof of claim with the trustee and give the trustee complete details of his security. The penalty must be greater than the penalty imposed under the existing act. That is one of our major weaknesses under th present act. The penalties are insufficient.

The Chairman: That would make all these provisions in relation to secured creditors unnecessary.

Mr. Baird: A strong penalty would give the trustee the knowledge—

The Chairman: If you put an amendment in the existing act along the lines you have suggested, that would be in substitution for all the provisions they have written into the new act, presumably to deal with the defects in the present act.

Mr. Baird: There is another defect that my suggestion would not cure. That is the defect that the trustee is not given complete control over the realization of the asset. It is a question of who are you going to give this responsibility to. Are you going to give it to the trustee in bankruptcy, whose general allegiance is to the preferred and unsecured creditors; or are you going to give it to the secured creditor who is astute enough to bargain and obtain security for his loan? In many instances, the secured creditor has more money at stake than the other creditors, and he has had the foresight, the ability, or strength, to demand security. To whom are you going to give the responsibility of determining how the assets will be sold? To whom will you give that right?

The Chairman: When you create a security, you provide for rights as a matter of contract in the terms of the security.

Mr. Baird: That is correct.

The Chairman: Are there any circumstances under which those or some of them should be denied?

Mr. Zwaig: In addition to David's recommendation as to how the existing act could be amended, if we put in an additional amending clause making it mandatory for the secured creditor to report to the trustee on his realization, and perhaps even assuring that the trustee who is realizing for the secured creditor is compelled to report to a regulatory body such as the Superintendent of Bankruptcy, this may cure both problems.

Senator Connolly: How many sections of the new bill would be affected?

Mr. Zwaig: Quite a number, in all areas of the bill and in all parts of the bill.

Mr. Baird: If you notice the heading "Secured Creditors: Summary of Provisions of Bill C-60 affecting secured creditors on bankruptcy proceedings and commercial arrangements," you have your stay of proceedings created by section 94(1) of the new act. That creates a stay of proceedings when a debtor files a notice of intention to file a proposal. Section 95(4) creates a stay of proceedings when a proposal is filed. Section 138 creates a stay of proceedings when a petition for bankruptcy is filed. There is a further stay of proceedings in section 238(3), which is a stay on realization. It provides that:

> Notwithstanding section 240, after a proposal or a petition is filed in respect of a debtor, a secured creditor shall not, unless he is so authorized in writing by the trustee, realize or otherwise deal with any property of the debtor in which the creditor has a security interest until ten days have elapsed following the date of the proposal or the date of bankruptcy.

That sounds relatively innocuous, with only a 10-day stay of proceedings. But there could be a tremendous delay between the date of the filing of the involuntary petition and the subsequent date of bankruptcy. It could be at least four or five months or even longer in some instances. So that section creates a stay of proceedings for a considerable length of time and it does not provide, in any place that I can find, for leave of the court to give the creditor relief. This is, I think, a serious weakness in that section.

The Chairman: The secured creditor, under the proposed bill, is really denied a lot of the power which is given under the security that he holds. The philosophy behind that almost sounds socialistic—that is, if you are going to group in some way all the assets, both the assets on which there is security and the ordinary creditors. The net result may be a penalty or a loss to the secured creditors.

Senator Cook: Apart from that, if you go back further, long before the bankruptcy, you own some property and you want to raise money on it. The act makes your property really less valuable in your hands for the purpose of raising money.

Mr. Baird: That is very true. It is because you cannot give as strong a security as you can under the present law.

Senator Cook: This penalizes a businessman who has accumulated a certain amount of property and who wants to do something with it. His hands are a little tied at this stage. Where before he could raise $100,000, now he can raise only $75,000.

The Chairman: Senator Flynn, I am interested in getting your reaction. You have a security which is created under provincial law and with full rights of enforcement, etcetera. Now you have this provision in the bankruptcy law. The field of bankruptcy is exclusively federal. So there you immediately have a conflict.

Senator Flynn: The question of ancillary powers comes in. I was thinking about the priority given to the wage earner up to $2,000, the priority on secured creditors. It seems to me that it is not really a matter of insolvency or bankruptcy here, but a modification of a contract. You are

entering the area of property and civil rights directly, without really any direct relation to bankruptcy or insolvency.

The Chairman: We are reclassifying the order of priority—

Senator Flynn: —when you are dealing with preferred creditors. These are created by the Bankruptcy Act. When you deal with the rights of secured creditors, you are directly in the area of civil rights and property.

The Chairman: As I understand it, if a secured creditor has any doubt or uncertainty as to the direction in which the debtor is going, if he moves fast enough he can realize on his security before the bankruptcy intervenes.

Senator Flynn: Yes, he could.

Senator Connolly: Provided he has under his security documents the right to foreclose.

The Chairman: I would expect there would be a revision of some of the clauses in the security documents.

Senator Flynn: I would assume that if the secured creditor would move, the others—the preferred or non-secured creditors—would move in the right way, and you could not really realize your mortgage, for instance, before the bankruptcy would occur, or the arrangement would be proposed.

The Chairman: The other creditors or even the debtor.

Senator Flynn: The debtor himself might be interested in filing an arrangement.

The Chairman: And any action by the secured creditor.

Senator Cook: It would certainly be a nuisance value.

Mr. Baird: A major problem is this question of nuisance or "blackmail" problem which might exist. If it was quite clear to the trustee in bankruptcy that there was no equity in the property and the secured creditor had a sale pending that would realize as much as he thought he was going to get out of the property, but leave nothing over for the trustee in bankruptcy for distribution, the trustee could come along and object to that method of sale and say "You must go to court and get a court order setting the terms of realization" and in turn bargain for payment to which otherwise he would not be entitled. So there is a risk of blackmail treatment here in order to buy off the trustee in bankruptcy.

Mr. Zwaig: The cost of financing these provisions dealing with secured creditors and the super-security given the wage earner in the $2,000 would certainly increase the cost of financing in the country. Further, we might envisage that a secured lender would calculate the number of employees, times a possible liability of $2,000, draw up a document, let us say for $1 million, advance to only $750,000, retaining $250,000 for a hold-back, for instance. This might be found quite possibly easy to do when dealing with construction advances. We face a real problem in this regard. Perhaps we should increase the priority given to wage earners from $500 to $2,000, or as may be determined from time to time based on the cost of living and stop there, removing this proposed super-security.

Mr. Baird: That is something we have not yet got into, but it is one step further. The proposed legislation proposes to reduce the rights of a secured creditor and contains a provision whereby each wage earner will have a priority over all other creditors to the extent of $2,000, intended to cover arrears of wages, vacation pay and termination pay. Whether it effectively does that is a question mark.

Senator Flynn: That $2,000 is for each employee.

Mr. Baird: Yes.

Senator Flynn: So far a plant with 100 employees and a bond issue on the building, $100,000 could be taken away.

Mr. Baird: It would create several problems. One is that which you suggest, Senator Flynn, of reducing the amount which can be borrowed against that particular asset. There is also a relatively simple way to circumvent it. That is to incorporate two companies, one to own the assets and the other to employ the employees.

The Chairman: And the other one to operate.

Mr. Baird: That is right; one would own any assets, but the employees would be hired by the other.

Senator Flynn: But the second company could be put into bankruptcy immediately.

Mr. Baird: But that would not do any good. The only company that owned money to the employees would be the operating company, which would have no assets and the employees would not be paid. That is a very clear method of evading it.

The Chairman: No; avoiding it.

Mr. Baird: Avoiding; I am sorry. The problem of paying wage earners is a problem today. Under the Bank Act there is priority over section 88 security for arrears of wages up to a period of three months if there is a bankruptcy situation. The banks are avoiding that provision somewhat by taking debentures. There is no priority of wages over debentures, or security by way of assignment of book debts. So that provision is not as effective as it might be to protect the wage earners.

Senator Cook: Surely $1,000 would be sufficient for a man earning $12,000, which would be ample for one month's income. He may lose vacation pay and so on, but that would be hard luck.

Mr. Zwaig: The reason it is being increased to $2,000 is that included in it is much more, an award to the individual for severance pay in addition to making up the deficiency of vacation pay and so on.

Senator Flynn: It seems that we could entertain only the principle of priority and not priority over secured creditors. Under the present legislation generally there is a clear distinction between secured creditors and preferred creditors. If preference treatment were given to the wage earner it would be normal, but if the priority over secured creditors were given that would change the whole substance and concept.

The Chairman: We must be careful to distinguish between the priorities set out in the act itself.

Senator Flynn: Created by the act, yes.

The Chairman: Yes, and that really relates to unsecured creditors.

Senator Flynn: Yes, that is correct. Of course, in some cases security is provided by provincial law and priority under the Bankruptcy Act. I have had no specific experience, but that is speaking generally. Let us say, for instance, a landlord has a right under provincial law, which really is a security, but he has a priority under the Bankruptcy Act. If we could make that distinction very clear and retain the principle of priority for wage earners and other types of creditors it could be a solution.

The Chairman: Really, Senator Flynn, under the present act there are secured creditors, who have their rights. Then there is the other category, unsecured creditors, and we have an order of priority established there.

Senator Flynn: That is right.

The Chairman: However, this bill would mix the two, to the detriment of the secured creditor.

Senator Laird: By the way, has either of you gentlemen given consideration to the very interesting point raised by Senator Flynn as to the constitutionality of re-writing a contract, which could then be considered to be in the category of property and civil rights?

Mr. Baird: We have realized that the question of constitutionality is a serious problem. I have been told by the Assistant Superintendent in Bank- ıptcy that they have obtained legal opinions saying that the provisions in the new legislation are constitutional and come within the heading of insolvency. I have not done any research of my own in that respect.

The Chairman: Did you expect any different answer? We hear that constantly with respect to bills which come before us in which there seems to be any mixture of these two concepts.

Senator Connolly: Mr. Chairman, with respect to preferred creditors, is the philosophy of the bill, first of all, that the secured creditor should not hold a fire sale, for example, if he is going to exercise a right of sale, or that he is going to have an easy foreclosure and foreclose any other mortgagees, taking the property, which might be infinitely more valuable than the amount of his security?

Mr. Baird: Yes.

Senator Connolly: In a foreclosure he is not required to have a sale. If he forecloses the second, third and other mortgagees, he acquires title to the property, which may be more valuable than the amount of his advances. It is to control that and to control the possibility of a fire sale?

Mr. Baird: Provisions are being introduced which would have that effect, yes. The fact that there are certain controls under provincial law to preclude a fire sale at the present time seems to be ignored and no cognizance is taken of those provisions. Provincial laws are weak in some of those cases and an endeavour is being made to bolster them by the provisions of the Bankruptcy Act.

Mr. Zwaig: Further, that even in the event of a fire sale, if the secured creditor were to realize in excess of what is due to him, he must turn it back either to the company, if it is still operating, or to the debtor, if it is still operating, or to the trustee in the event of bankruptcy.

Senator Connolly: That is in the case of a chattel, or a piece of real estate, when the power of sale is exercised. However, in the case of a straight foreclosure, when the subsequent mortgagees are foreclosed and the property is taken and title obtained to it, under the present act there is an entitlement to keep that property, although the amount of the loan might be much less than the value of the property.

Senator Flynn: That would be before the bankruptcy occurred.

The Chairman: Senator, under the procedure to which you refer, is there not a right for the debtor to appear during the proceedings, set out all these facts and ask the court to direct a sale?

Senator Connolly: Yes, and whatever that right might be would devolve upon the trustee also.

Mr. Zwaig: Also, as Mr. Baird indicated, there is protection in the provincial legislation. I think perhaps Senator Flynn can confirm that in the Province of Quebec there is a provision for 60 days' notice before taking action, which protects the junior mortgage holders in addition to the debtor.

Senator Flynn: Also, as long as judgment is not rendered, payment may always be made. A notice of 60 days must be given before the equivalent of foreclosing is commenced. Then action must be taken and if anyone pays the amount of a claim before judgment it must be accepted. Under the present legislation, in any event, a delay of six months can be obtained and the creditor can be forced to value his security. If the amount of his evaluation can be found, he can be paid and security in the estate of the bankrupt obtained.

The Chairman: This point requires rather careful attention.

Senator Connolly: The suggestion seems to me, then, that perhaps we think about it in terms of not altering radically, as is proposed in the bill, the rights of the secured creditors, but perhaps restraining or restricting them in some manner for the benefit of the trustee or the debtor.

The Chairman: Mr. Zwaig and Mr. Baird have suggested that if we made it mandatory that the secured creditor must file a proof of claim, he must value, and then the trustee, of course, has the right to pay at that value and acquire the property.

Senator Connolly: Yes.

The Chairman: That is all contained in the present legislation.

Mr. Baird: The mandatory provision is not in the present legislation, which is one of the serious weaknesses in the present law.

Senator Connolly: If we did it that way, I take it we would avoid any implication of the constitutional problem.

Mr. Baird: I might comment on the wage earner problem.

Mr. Zwaig: Dealing with secured creditors.

Senator Connolly: We have dealt with secured creditors. At the moment we are discussing the priority of wage earners and whether they should take precedence over the secured creditor.

The Chairman: Don't let us become confused there are two aspects, priority and the secured creditor. If priority for the wage earner in the whole class of unsecured creditors is desired, that is contained in the present legislation.

Mr. Baird: Yes.

The Chairman: But when you talk of giving the wage earner a right over and ahead of the right of the secured creditor, it is an entirely different animal.

Senator Connolly: Yes.

Mr. Baird: An alternative solution, which in my opinion is more acceptable, is that of an insurance sceme, an arrangement whereby government would pay the wage earner immediately and then would rank as a preferred creditor in the ultimate distribution of the bankruptcy. The real problem we face today is that on Friday night a wage earner is told by a secured creditor, or the trustee in bankruptcy that he is out of work and has no money to take home to buy food for his family for the week-end. This is a serious problem. He eventually might obtain his preferred claim in the priority set out in the existing Bankruptcy Act, but he might not. If the assets were insufficient to pay the claims of the secured creditors, there would be not payment to the wage earners. It is a question of should government and society step in and ensure that the wage earners are compensated for such a loss in the same manner as is practised under the Unemployment Insurance? If it did, the government could then file as a preferred creditor and be reimbursed in the event sufficient assets were available for distribution to preferred and unsecured creditors.

The Chairman: Of course, there is a different way of doing it. Rather than increasing the burden of government and the unemployment insurance fund, which only means increasing the burden on all taxpayers, there could be provision for the establishment of a fund, a levy on all employees similar to their contributions to the Workmen's Compensation fund and other contributions they now make, to a fund which would be used for this purpose.

Mr. Baird: I think that would be a good suggestion. It would be a relatively modest amount, much less than would be required under the unemployment insurance requirements.

Senator Cook: Have you any idea how much this would be in a year?

Mr. Baird: No, we do not. We would like to find out, and we will attempt to find out for you. We do not have statistics. The problem is that frequently in these circumstances we do not have a bankruptcy. The secured creditor realizes on his assets; there is no money available and a company does npt go into bankruptcy. As a result, there are no claims filed and the Superintendent of Bankruptcy does not include that type of proceedings in his statistics.

Senator Beaubien: Would this bill change that situation?

Mr. Baird: Yes, we think the existing bill would change it, because it would encourage a wage earner to put the company into bankruptcy in order to get priority over the secured creditor.

Senator Connolly: Surely the creation of an insurance fund would be something that would have to be done outside the provisions of the Bankruptcy Act. Would that have to be a piece of provincial rather than federal legislation?

The Chairman: No.

Senator Connolly: It could be done by federal legislation?

Mr. Baird: There is the old test of insolvency. It would apply only if the company is insolvent. You would be using the same basis for that type of legislation as is used for most of the legislation incorporated into these provisions.

Senator Connolly: You could put it into the Bankruptcy Act.

Mr. Zwaig: I hink it would probably come under the Minister of Finance's budget; it would be included.

Senator Flynn: It could be an insolvency compensation commission. By the very fact that it would deal with insolvency, it would come under federal legislation.

The Chairman: It would be a wage fund against insolvency.

Mr. Zwaig: Yes.

The Chairman: And would be a very cheap contribution.

Senator Connolly: There are probably other ramifications. This is a fund that would probably build up. The profitable, successful companies would not be making claims. It would be resorted to only where there were failures, so there would have to be some provision for trustees and investment of the moneys.

Senator Flynn: Just like the Workmen's Compensation Board.

Senator Connolly: There is a spillover of other requirements.

Mr. Zwaig: You could fast run up a substantial surplus in the fund, because the large employers would be contributing heavily.

Senator Flynn: There could be classes of contributors, as there are with Workmen's Compensation.

Mr. Baird: The amount of the contribution would be relatively small on an overall basis, and I think the benefit it achieved would be well worth it.

Senator Cook: How much of the $2,000 is arrears? You say it was made up of vacation pay and so on. How much is wages that did not get paid?

Mr. Baird: Wages would be somewhere between $500 and $1,000. You would be very unlikely to have wages in excess of $1,000.

Senator Cook: The man is not going to go every Friday night and not get paid and then go back to work. The first Friday he is not paid, the first time the contribution is in arrears, he raises the roof.

Mr. Baird: I presume it would be approximately two weeks of wages that he would not be paid.

Senator Connolly: I suppose the departmental officials have access to this discussion, because we are here talking

about a fundamental concept in respect of this bill, which may require some very careful attention.

The Chairman: They will, in due course, on two bases. First, there is the verbatim report, which they read very thoroughly. Secondly, last day they had a man sitting in who was making notes. Although I told him he could come every time I do not see him here today, but that is their problem. I thought what this committee wanted was to get a real understanding of the bill before we examined the departmental officers; we would then be better able to handle them.

Senator Connolly: Yes, very good.

The Chairman: Is there anything more on that point?

Mr. Baird: I think we have pretty well finished our discussion on the wage earner provision. It is a real problem both in concept, in giving them security over secured creditors, and also because the administration provisions are extremely cumbersome. It gives the trustee in bankruptcy the right to borrow funds in order to pay the wages; he has the right to give security on the assets in priority to the present existing secured claims. It does not specify what interest rate will be paid, or how that interest rate will be determined; it does not provide what will be the period for repayment of the loan; it does not say what rights the lender to the trustee in bankruptcy will have; it does not say who pays the costs of arranging the loan if there are insufficient funds to go into the bankrupt estate. And we are only talking about payment of wage earners in priority to secured creditors. It leaves so many administrative problems unsolved. In addition, it provides for an apportionment of the borrowing over all secured creditors, so if there are ten mortgagees each of them will be subject to paying a portion of the claims of the wage earners. It is apportioned on the basis of the value of the security interest. What does that mean? What is the value of a security interest? If you have a mortgage of $10,000 on a $20,000 property, you think your value of security interest is $10,000. If you have a $10,000 mortgage on a $8,000 property, it is what you realize. We will not know what the value of the security interest is until all the assets have been sold, so each secured creditor will not know where he stands until all the assets have been realized. It leaves a nightmare for a trustee in bankruptcy to sort out.

The Chairman: One horrible thing about it is that the trustee can borrow money and pledge the security of the assets ahead of the rights of secured creditors and raise money to pay the wage earners. Then how does he get reimbursed? He just makes a levy pro-rated on the secured creditors. This is some new philosophical theory, or otherwise; it seems to be making the wage earners as a body help themselves, and they can help themselves by the method I suggested, of having a fund. There would be a deduction from their pay each week, or every two weeks, a percentage, which would be very, very small overall, which would be a fund that could take care of these situations. Why pick on the secured creditors?

Senator Walker: It is the grossest kind of socialism, almost Marxism.

The Chairman: I hesitated to use that word, but you have really interpreted my words correctly.

Senator Walker: Thank you, sir.

Senator Macnaughton: You covered it in the phrase "or otherwise."

Mr. Baird: I would like to move on to deal with secured creditors under extension and composition arrangements. We have talked generally about the stay of proceedings. Extension and composition arrangements are those available for a wage earner. The wage earner is defined in the bill as being a person who has debts of less than $10,000 and has not gone into business. The word "and" is very significant. He can have debts of more than $10,000, but if he is not in business he is covered by these provisions. It means that any individual who is not in business is covered by the extension and composition arrangement provisions of the new bankruptcy bill. It is not just the small individual we are talking about; we are talking about all individuals who have not gone into business. We are talking about the individual who has not gone into business and whose debts are less than $10,000.

There are very sweeping provisions concerning the rights of secured creditors under these types of extension and composition arrangements. If you look at the memorandum I prepared as an outline for you, the stay of proceedings is created by clause 68 until the request for the arrangement is withdrawn or rejected, the proposal is rejected or leave of the court is obtained. It covers claims of all creditors whose claims are admissible under the arrangements, and in an extension agreement almost all creditors who have security on personal property are caught by the arrangement. The wording is very difficult to figure out. Clause 78 provides that debts which are secured by real property are not covered by an extension arrangement, so mortgages on houses are not covered and we can forget about those. It has got a very restrictive provision with respect to personal property. A debt secured by personal property, such as a chattel mortgage on a car or a conditional sales contract, is only excluded from the arrangement if less than two-thirds of the amount of the debt have been paid and the security interest was given less than 60 days prior to the date of the proposal.

Senator Connolly: Give us an illustration of that.

Mr. Baird: Suppose a debtor comes along and says he wants to pay his creditors 100 cents in the dollar. He has purchased a car under a conditional sales contract. That contract has been running for three months; it was normally to be paid off within a year. Under this arrangement he does not have to pay his finance payments on the car, and he is entitled to include the creditor who has the conditional sales contract on the car with all his other creditors, pay the funds to the administrator, who then disperses those funds among all creditors. In effect, the secured creditor at that stage has no greater rights than the unsecured creditor.

The Chairman: And the debtor in the meantime can drive the car.

Mr. Baird: The debtor in the meantime is entitled to keep the car and use it.

Mr. Zwaig: The interesting follow-up to that is that in the event of an arrangement where the debtor is in default for three consecutive months, the arrangement is annulled and all the creditors come back for their original amounts. Conceivably what can happen is that someone can file an arrangement with really no full intention of meeting the

full payment. He defaults for two months, pays the third month, but the secured creditor still cannot do anything to get the car back. He continues defaulting for the following two months, he pays the third month, he is never fully in default to allow that secured creditor to take hold of the car.

Mr. Baird: The secured creditor could go to the court and apply to have the proposal annulled if he could prove this course of intentional conduct on the part of the debtor just to avoid his obligations.

The Chairman: You have a secured creditor in those circumstances going to the court and incurring costs in order to void this situation that these clauses of the bill will create them?

Senator Macnaughton: There is a greater loss.

The Chairman: Yes, in that form. I think that is something we should put a red star on. We have a lot of red stars that we have to be ready to look at, where amendments will undoubtedly be necessary.

Mr. Baird: Composition arrangements are arrangements wehreby the debtor offers payment of less than 100 cents in the dollar. In that case, the holder of a conditional sales contract is not covered unless more than two-thirds have been paid. If more than two-thirds have been paid he is automatically covered by the composition arrangement, and therefore will not be paid 100 cents in the dollar. If less than two-thirds have been paid, he is entitled to elect not to be covered by the composition arrangement and to rely on his security. If he elects not to participate in the arrangement he has the right to proceed and realize on his security in the event of default, so he is left with all his rights under his existing contract. He loses his right, however, to sue for any deficiency. I do not think that is wrong. I think that if he is entitled to retain his security and can rely on his security, that is satisfactory. He cannot even put a claim in, though, for his deficiency.

The Chairman: No matter what the realization was, if if was less than 100 cents in the dollar to him, he has to take it in full settlement.

Senator Connolly: In other words, it wipes out the covenant.

Mr. Baird: It wipes out the covenant, that is correct.

Senator Buckwold: In other words, if on the security the debtor has paid more than two-thirds, the creditor is left with the balance unsecured.

Mr. Baird: Yes. He loses his security. For that unsecured portion he will be paid so many cents in the dollar in accordance with the composition arrangement. His security is taken away from him.

Senator Buckwold: In other words, if he buys a car, he owes $3,000 and pays $2,100 the other $900 is an unsecured debt?

Mr. Baird: Yes.

Senator Walker: What kind of development is this that is going on? Who authored this bill?

Mr. Baird: The work is generally the result of the study committee appointed by the government to make a report on the Bankruptcy Act. The study committee consisted of—

Senator Walker: You were not on it, I am sure.

Mr. Baird: No. It consisted of Raymond Tasse, who was formerly Superintendent of Bankruptcy; John Honsberger, a lawyer from Toronto; and Pierre Carignan, a university professor from Montreal.

Mr. Zwaig: And the Superintendent of Bankruptcy, Mr. Landry.

Senator Walker: Did any of them have any practical bankruptcy experience?

Mr. Baird: Yes. Only one has been practising in the bankruptcy field. That is Mr. Hansberger from Toronto. I do not think the other three have had any practical experience in bankruptcy matters.

Senator Buckwold: I have been in the position of an unsecured creditor. Let us go into a bigger field. A man has a mortgage on a property, and more than two-thirds is paid. Would the balance of one-third become unsecured?

Mr. Baird: No. A mortgage is specifically excluded from arrangements. A real estate mortgage is excluded. There is a distinction in what we call real property, which means land, and personal property, which means chattels.

Mr. Zwaig: Mr. Chairman, perhaps I can ask a question on something which I have not been able to find in the bill. During this period where the secured creditor, under the proposition for an arrangement, is electing to decide whether he is going to realize on his security himself, is the asset still in the possession of the debtor? The way I read the proposed act is that this asset, while the secured creditor is pondering, is still in the possession of the debtor.

Mr. Baird: It must be. Under section 68, even the filing of a request for arrangements stays proceedings. So that even if there is a default, the secured creditor does not have the right to take possession of the assets.

Mr. Zwaig: There is no vesting provision with the trustee or with the bankruptcy administrator.

Senator Desruisseaux: What would be the position if someone has a judgment that is being executed, at the time the corporation puts itself into bankruptcy, according to the new bill?

Mr. Baird: The new bill does not change the existing law. That type of proceeding would be stayed, and the new bill would also stay that type of proceeding.

The Chairman: Is there anything else?

Senator Hays: In any of these claims, do they differentiate between interest and principal? The other day I had a chap come to me who had a truck. They had taken the truck off him. He owed $3,000. He had had the truck for a number of years. He had paid in about half the principal. The remaining $3,000 accumulated at interest rates at over 20 per cent. It was compounded up to $3,000. Along with the security he had given them, he had also given his furniture and everything he had. Obviously he had gone into bankruptcy. They never separated the interest from the principal. You mentioned cars, and I was thinking about automobiles. It is legislating against stupidity, but it exists.

Mr. Baird: I think that is where the two-thirds comes in. I think they look upon the two-third principle as being

two-thirds of the debt being principal and one-third being interest. That is a sort of rough and ready rule, as to how they arrive at the two-third allocation. There is nothing in the act itself or in the bill which stipulates interest versus principal.

Mr. Zwaig: They are referring to two-thirds of the original debt.

The Chairman: The proposal is that we adjourn at this time. We have received leave to sit this afternoon. Perhaps we could gather here at 2 o'clock or soon after. I would like to make some progress today. We will not attempt to deal with all the bill today, but we have two or three other headings that we might be able to deal with this afternoon. Perhaps we could sit until 4 p.m.

Senator Walker: We might let them proceed without asking too many questions, because what we have been hearing to day is shocking.

The Chairman: When you heard me say, "That is the place for a red star," I meant that this is something that we must look at with a view to correcting it. When we come to the stage of what amendments should be made, we will go through the transcript. We will have these places ticked and we will prepare amendments. I have suggested that where necessary, from reading the transcript and from the reactions gained here, Mr. Zwaig and Mr. Baird should sketch out amendments which we will be ready to talk about later—amendments on which we can question the officials of the department when they are before us.

Senator Connolly: Is this bill now being actively considered by the House of Commons?

The Chairman: No. The bill has been tabled in the Commons. They will not proceed with second reading until the fall. I think they are hoping that we will do the work for them. We are ready to do the work, but once we do it, they will have to buy it.

We will now adjourn until 2 p.m.

The committee adjourned.

Upon resuming at 2 p.m.

The Chairman: Honourable senators, we will resume the hearing. Mr. Baird, will you please pick up where you were when we adjourned this morning?

Mr. Baird: This morning I believe we had just finished discussing the rights of secured creditors and how they are affected by the new provisions of the Bankruptcy Act. They are affected by the commercial arrangements, the extension arrangements, the composition arrangements and the provisions involving wages.

The next topic with which I would like to deal is that of cessation of bankruptcy. This is a new term for discharge of the bankrupt. I have prepared a memorandum to be distributed for the topic of cessation of bankruptcy. The present practice is that after 90 days a person who has gone bankrupt has the right to apply for discharge from bankruptcy. That application must be made within one year. So we have an application for discharge made between three months and 12 months after the man goes bankrupt. This application is made to the court.

Senator Desruisseaux: Mr. Chairman, what happens if he does not make an application?

Mr. Baird: He remains an undischarged bankrupt for the remainder of his life. There is no requirement that he apply for his discharge from bankruptcy. He could have the status of an undischarged bankrupt for the remainder of his life. I had a case of a doctor who did this. Under our present law a doctor is not subject to an order for payment out of his earnings. This man was a specialist, making good money, but making it on fees. As a result, while he was an undischarged bankrupt we could not apply for an order requiring him to pay a portion of his fees to the trustee for distribution among creditors. However, if he applied for his discharge, the court could impose such a condition upon him. He withdrew his application for discharge, which I strenuously opposed, but I was unsuccesful. He carried on and, to my knowledge, is still an undischarged bankrupt. This is one of the weaknesses in our present Bankruptcy Act.

Senator Molson: Does an undischarged bankrupt pay income tax?

Mr. Baird: Yes, he does.

The Chairman: So, there are some advantages, but again, Mr. Baird, although you say this is a weakness, it is a weakness which can be corrected by a simple amendment.

Mr. Baird: Oh, yes.

The Chairman: We do not have to go into pages of printing such as we have in the new bill.

Mr. Baird: Not to correct that problem, no. The application for discharge then comes up before the court, which has the jurisdiction to make an absolute order of discharge, to suspend the discharge or make it conditional upon payment of money to the trustee for distribution among creditors. That is the present system. The new legislation provides for a completely different system of discharge and uses the term "cessation", to which we will have to become accustomed. It provides for an automatic discharge 90 days after the date of bankruptcy.

Senator Desruisseaux: Automatic?

Mr. Baird: Automatic. If the administrator files a caveat, the bankrupt would not be discharged for a period of five years from the date of bankruptcy. The debtor, the bankrupt, does have the right to apply to the court for the discharge and in the new act a discharge is described as a certificate of non-responsibility. That is very strange to me. Even if a man's conduct has been proper, I still think he would be deemed to have been responsible for his bankruptcy. To issue a certificate of non-responsibility seems to be completely incongruous.

The Chairman: That is in line with what you said the other day. The terminology that is being adopted is foreign to the language that we understand in relation to bankruptcy.

Mr. Zwaig: That is correct.

The Chairman: If we do not like "cessation" we call it "discharge", can we not?

Mr. Baird: Yes.

Senator Molson: It is something like no fault insurance, I take it. It is the same idea. There is no suggestion of responsibility or fault attached.

Mr. Zwaig: What the bill is trying to do, as well, is to separate the bankrupt individual from the bankrupt's assets. So that the date he becomes a bankrupt, his liabilities are totally discharged, but he maintains or continues the status of a bankrupt for 90 days. If there is a caveat filed and in fact confirmed by the court, assuming the bankrupt applies to the court, he then maintains the status of a bankrupt for five years. In other words, there is no in between period. Either you are discharged as a bankrupt in 90 days or you are discharged as a bankrupt five years down the road.

The Chairman: What happens to the assets of a bankrupt who is discharged automatically in 90 days?

Mr. Baird: All of the assets of the bankrupt at the date of bankruptcy, basically, vest in the trustee for distribution among the creditors, and if he acquires substantial wealth during the 90-day period, that, too, will go to the trustee for distribution among the creditors.

The Chairman: What the bill is doing, then, is separating permanently the bankrupt from his assets.

Mr. Zwaig: That is correct.

The Chairman: What is your comment on that? Is it good or bad?

Mr. Baird: I think it is too rigid a period of time. I think the concept of dividing the assets from the status is a reasonable concept. In other words, any assets the man owns at the date of bankruptcy will basically vest in the trustee in bankruptcy for distribution among the creditors. Any assets he acquires after that date he is entitled to keep on the basis that he is entitled to a fresh start. This gives the bankrupt an opportunity to rehabilitate himself.

I am not opposed to that concept. However, the concept is not all that rigid. Imposed upon the concept is a provision whereby when the bankrupt retains the status of a bankrupt, the court can order payment of a portion of his earnings over $500 a month to the trustee for distribution among the creditors, thereby breaking that principle of separation.

Should we have a specific provision relating to payments out of a bankrupt's earnings? I think we should. A professional man may be heavily in debt with the result being that he declares bankruptcy. He may have no assets at the time he declares bankruptcy, but he has a tremendous potential earning capacity. In such cases, it seems most unjust to me not to have an order relating to payments out of earnings. The courts generally have been very lenient in making orders for payment. They have permitted the bankrupt to maintain his normal status of living, only requiring him to pay surplus income to the trustee for distribution among the creditors.

The Chairman: That can be corrected by a simple amendment to the bill.

Mr. Baird: Yes.

The Chairman: We will tick that for possible amendment. Somebody thought I was being somewhat biased this morning when they heard me talking about putting a red star beside these things.

Senator Cook: If a lawyer goes bankrupt, can he continue to practise law?

Mr. Baird: Yes, provided he has not been dipping into his trust account.

Mr. Zwaig: If an accountant in the Province of Quebec goes bankrupt he is suspended from membership in the institute as long as he is an undischarged bankrupt. He can re-apply for admission once he obtains his discharge.

Senator Cook: You have a pure association.

Senator Molson: The lawyers look at it a little differently, I take it.

Senator Cook: I was astounded to think that a doctor could go bankrupt and be allowed to go on.

The Chairman: Well, they put more responsibility on the legal profession.

Mr. Baird: One of the provisions deleted from the proposed new act is the provision in the existing act whereby if a man is employed and is subject to an order for payment, the order can be served upon his employer in the way of a garnishee or an attachment order, thereby requiring the employer to pay the money directly to the trustee. For some reason, that has been deleted from the new act. I think it is a provision that should be retained.

The Chairman: I think so, too. We will tick that also.

Mr. Baird: The provision concerning payment is also a little vague. It talks about a man who earns $500 a month. Under this provision a person on salary earning $500 will be caught. However, in the case of a professional man whose earnings are based on fees, or a salesman whose earnings are based on commission, the earnings will fluctuate.

I think an historical test would be far better. If you are going to use $500, I think it is too low. In my opinion, the test on the type of order that might be made in the future should be one based on the individual's past earnings.

The Chairman: You mean over a period of five years, or something like that?

Mr. Baird: I think five years is too long a period. The average of his previous year's earnings, I think, would be more reasonable. The averaging provision does make much more sense to me than just a specific amount per month.

The Chairman: We will tick it.

Mr. Baird: A real estate salesman might earn very little this month but have a large income next month.

The Chairman: Yes.

Mr. Baird: Another provision I would like to see is one giving the court the right to determine whether a man is going to have the status of bankrupt for one year, two years, three years, or whatever. There has to be some flexibility in this respect. Under the proposed new act, there is no flexibility. It is all or nothing.

I am also concerned that the creditors are not given any right of input into the situation. The decision is that of the administrator. If the administrator decides not to file a caveat, the bankrupt is discharged. If he does file a caveat, then it is up to the court to determine whether the caveat

should remain in force. The creditors are not given any right of input into it. I would recommend that the administrator be required to consult the inspectors who represent the creditors to determine their opinions or, in the alternative, give any creditor the right to file an opposition to the discharge of the bankrupt. Any creditor could then be in a position to oppose the man being discharged automatically after 90 days.

Senator Cook: Just to refresh my memory, what disability does the bankrupt suffer if he remains an undischarged bankrupt?

Mr. Baird: I have another memorandum on that. Perhaps we could distribute that now.

The Chairman: Before you do so, I take it that under section 221 of the new bill, notwithstanding 90 days having passed and notwithstanding the lodging of a caveat, the bankrupt can still go to court?

Mr. Baird: Yes, the bankrupt is entitled to apply to the court to have the caveat removed and a certificate of non-responsability issued. He has the right, in effect, to appeal to the court from the decision of the administrator.

The Chairman: If I understand you correctly, the judge in hearing that application from the bankrupt would not be in a position where he could impose a term, assuming he makes this order, that the man must agree to pay a percentage of his income for so many years?

Mr. Baird: That is correct.

The Chairman: That is not in the bill?

Mr. Baird: That is not in the bill.

The Chairman: And that is one of the things we ticked?

Mr. Baird: Yes.

The Chairman: Very well.

Mr. Baird: He can only discharge him or not discharge him. He cannot make the discharge conditional upon payment.

Mr. Zwaig: There is one more thing to re-emphasize here, in my opinion, and that is that the caveat is filed based on an investigation by the bankruptcy administrator. I am of the opinion that there would be very little input, the way the bill is written, from creditors and inspectors. The decision to file a caveat is based on what may eventually be a very biased recommendation, and I think there should be third party input on a decision of this magnitude.

At that point in time, you are no longer treating the Bankruptcy Act as a rehabilitative act; you are treating it, really, as a punitive act.

The Chairman: We have another memorandum under the heading "Status of a Bankrupt".

Mr. Baird: This memorandum was prepared separately because there is a provision we will be coming to in the new bill which gives the court the right to impose the status of a bankrupt on an officer or director of a company that went bankrupt. I kept it separate because of the fact that it would be used both in cases of individuals going bankrupt and where obligations and liabilities are imposed on an officer or director of a bankrupt company, so it is maintained as a separate basis. The major provisions dealing with the status of a bankrupt are the fact a bankrupt does not have the right or power to enforce or assign an agreement whereby he extends credit; if anyone owes money to the bankrupt the bankrupt cannot sue for it, or he cannot assign the account to a bank; the debt is unenforceable.

The Chairman: When?

Mr. Baird: During the period that he is a bankrupt.

Senator Cook: The trustee can.

The Chairman: After he becomes bankrupt, if he incurs any obligation thereafter while he is still a bankrupt the person who extends credit cannot sue for it.

Mr. Baird: He cannot sue, that is correct; it works both ways.

Senator Connolly: When a trustee is appointed does he take over those rights?

Mr. Baird: Yes, he takes over the existing obligations. If there is money owing to the bankrupt at the date of the bankruptcy the trustee takes that over. Assuming the bankrupt after the date of bankruptcy extends credit to somebody, to somebody for some purpose, a loan of $500, the bankrupt could not sue for that. We are assuming the transaction took place after the date of bankruptcy.

Senator Connolly: That would not be vested in the trustee?

Mr. Baird: No, that would not be vested in the trustee.

Senator Cook: It seems a senseless provision.

Mr. Baird: It appears to be attempting to prevent the bankrupt from going into business. Rather than just prohibiting the bankrupt from carrying on business, they do it in a sort of circuitous fashion by providing that credit given by the bankrupt cannot be enforced, and also credit given to the bankrupt to enable him to carry on business cannot be enforced. It makes more sense just to prohibit him from carrying on business; that would be a much simpler approach to the problem.

The Chairman: Does that make sense? Is that when you want? If a man is bankrupt and he has any sense of integrity at all he may want to get going again. This would force him to take casual labour or some service job of that kind, but he could not try to set up a business, because he could not get any credit.

Mr. Baird: That is correct; that is the effect of these provisions.

The Chairman: Is that what you want? What is it under the present act?

Mr. Baird: It is a very similar provision. However, he has to make disclosure of the fact that he is a bankrupt before he can carry on business; he must tell every person he deals with that he is an undischarged bankrupt. It must be realized that these provisions relate to the person who is deemed to have been culpable, the person who has done something wrong. These provisions are designed to cover only the person the administrator feels has committed, not an offence, but some act under clause 200. There is quite a detailed list of these items in clause 200. You might take a look at them, because they tie in very directly with the status of a bankrupt. If any of the circumstances set out in

clause 200 are found, these are grounds for extending the status of the bankrupt. Clause 200 is at page 101 of the bill. There you see set out circumstances such as:

> (a) the incurring by the bankrupt of an unjustifiable expense by the taking or continuing of a frivolous or vexatious proceeding;
>
> (b) any act done or omitted by the bankrupt with a view to defeating or delaying the creditors generally.

It is misconduct which will cause the administrator to file a caveat and extend the status of a bankrupt for a period of five years.

The Chairman: So the bankrupt, if he were carrying on business, could not have a fire sale.

Mr. Baird: If he has a fire sale and subsequently goes bankrupt he has problems. Clause 200(e) says:

> the continuation of a business by the bankrupt where it was continued
>
> (i) by resorting to sales below cost, ruinous borrowings or similar acts.

The Chairman: In those circumstances the trustee may very well file a caveat.

Mr. Baird: Yes, they are the circumstances where he will file a caveat.

Senator Desruisseaux: Is the trustee the sole judge of the frivolous acts?

Mr. Zwaig: The way I read it, he could very well be the sole judge of these acts. What bothers me further is that it says:

> by resorting to sales below cost, ruinous borrowings.

What are "ruinous borrowings"? Assuming a bank no longer wants to finance a company and the company goes to second type borrowing, is that ruinous borrowings? They are surely paying a higher interest rate, but they are still continuing in business. Is that what one would define as "ruinous borrowings"? I think we are putting an awful lot on the shoulders of one individual to make this final decision. Under the pr-sent act the trustee in bankruptcy is required to file a report within 60 days from the date of bankruptcy indicating who the directors and officers of the company are, what the causes for bankruptcy were, and under whose responsibility the larger portion of the debts arose. This is filed with the office of the Superintendent of Bankruptcy. I guess a record is kept of it somewhere, but it is certainly not widely distributed.

The Chairman: This bill does away with the position of a trustee in bankruptcy. Is that right?

Mr. Zwaig: Under certain circumstances, yes.

The Chairman: You mean except in cases where you have the propounding of a scheme, an arrangement?

Mr. Baird: No. The trustee will still take over the assets and distribute them, but he is not given any input, or very little input, on the question of the discharge of the bankruptcy. The investigation of the bankrupt's conduct will be performed by the administrator, which is a new word for the official receiver appointed by the Superintendent of Bankruptcy.

The Chairman: They seem to use the word "administrator" almost indiscriminately. When you are talking about an administrator, to put that label on him, are his duties limited to dealing with arrangements?

Mr. Baird: No, they are not.

Mr. Zwaig: Not in this context. The administrator will make this inquiry.

The Chairman: I am going further back than that. Where does the administrator acquire his authority to do anything?

Mr. Baird: Clause 199 gives the administrator power to make an inquiry, and that is in addition to his power to administer arrangements.

The Chairman: When a man files a petition in bankruptcy, or a creditor petitions for bankruptcy, who takes charge of the assets—the adminitrator? Who appoints the trustee?

Mr. Baird: The administrator. If it is a voluntary assignment or proceeding, it is the administrator who appoints the trustee. If it is an involuntary proceeding, the court has the right to appoint a trustee. If the court does not appoint a trustee, the administrator has the right to do so.

The Chairman: Under this bill you are making the administrator what you might call the top dog.

Mr. Baird: In a number of functions, yes.

Senator Connolly: Mr. Chairman, I wonder if it would help if we look at clause 15 of the bill at page 14. Briefly it says:

> Each of the provinces constitutes a bankruptcy district—

In subclause 2 it says:

> The Superintendent shall designate a bankruptcy administrator for each bankruptcy district—

And a man can preside over one or more districts, or you can have one or more administrators in one district.

Then in clause 18 they talk about trustees who are appointed by the administrator.

The Chairman: If our experts can work it out, I would like a statement on the duties and authorities of the administrator. Is there such a thing as a trustee under the new bill?

Mr. Baird: There is. We will be able to outline for you the duties of the trustee.

The Chairman: Also, whether it is an administrator or a trustee, do they acquire their position by appointment?

Mr. Baird: The administrator would be in the category of an employee of the Superintendent of Bankruptcy. The trustee is appointed by the administrator after receiving a licence from the Superintendent in Bankruptcy. The confusing aspect is that the administrator can also be a trustee. So you have private trustees who are licensed by the Superintendent of Bankruptcy, plus the administrator, who is an employee of the Superintendent of Bankruptcy, also being in a position to act as trustee.

The Chairman: Except in rare cases that are specified in the bill, you relate the administrator to arrangements.

Mr. Baird: It goes farther. That is quite right. He has exclusive jurisdiction over extension arrangements and

composition arrangements. That is correct. He then carries on and has additional functions. He is not limited.

The Chairman:: I think we should have a full description.

Mr. Zwaig: The administrator administers small debt arrangements, consumer bankruptcies, and, in the matter of commercial bankruptcies, will administer a particular estate where private trustees cannot be found.

The Chairman: That is the sort of information we should have. We should have it correlated in a statement. Where you think that any departure is subject to criticism and we should consider some change, we should have your comments.

Senator Connolly: Mr. Chairman, perhaps we should ask the witnesses to point out the section whereby the trustee is vested with the bankrupt estate. I do not see it in the bill.

Mr. Baird: I believe it comes under section 145 at page 71 of the bill. Subclause (1) provides:

> When a bankruptcy order is made, all the property of the bankrupt at that date vests in the trustee except

Senator Connolly: That is it.

Mr. Baird: That is your vesting provision. We have some interesting comments on that for you. One is that through some unusual twist of the wording they have provided that assets which are exempt under provincial law would not vest, but they do not exempt assets which are exempt under federal law; and Family Allowances, Old Age pensions, Veterans Allowances are all exempt under federal law. If you leave the wording the way it stands, those assets would be available for a trustee in bankruptcy. I do not think anyone ever intended that.

The Chairman: Right at the beginning, when we spoke about that, I said that was one that should be ticketed.

Mr. Baird: That will take only a very minor change.

Senator Walker: Was that intended—or did they know?

Mr. Baird: I do not think they know, senator.

Senator Walker: Why not scrap the whole thing? We have not had a good recommendation yet. I say that frivolously; but if it goes on, it is pretty awful.

Mr. Baird: We are highlighting the problem areas as we see them. There are a number of good administrative changes in the act and a number of improvements over the present act to give the trustee powers. So it is not all bad. I think it is unfair for us to tell you only that it is bad. There are some good provisions in it.

Senator Connolly: There is bad news and good news, and now we are getting the bad news.

Mr. Baird: We are trying to highlight areas which we think are novel and will create problems. Those are the areas on which we think you will hear submissions by other people. We think you should be prepared to understand the comments.

The Chairman: We should be in a position to be informed on the provisions in the new bill which differ from the old bill, which are not improvements and which prevent obstacles. We should know what those obstacles are. Is there anything that you could call a scheme or plan in the new bill that runs like a thread through the whole bill?

Mr. Baird: I think it is an attempt to give unsecured creditors more rights than they have at the present time, to protect the unsophisticated or incompetent grantor of credit against himself, and generally reduce the powers given to the shrewd competent lender. There is a general tendency to try to protect the inept person from himself, the person who extended credit without proper credit checks, without doing his homework or making sure that the person he extended credit to was competent and able to repay the money.

Mr. Zwaig: In addition, to regulate the administration of bankruptcy through greater government control.

Senator Cook: If you are going to give the unsecured creditors more security, and you are going to put up the rate of priority of the wage earner, the only person left is the secured creditor.

Mr. Baird: Most of them are, yes.

The Chairman: There is a principle involved there. Either you recognize the secured creditor's position or you don't. I do not know of anything so far, as a result of which I could argue, that the unsecured creditor should be permitted in any way to eat into the security which the secured creditor has. Certainly it is likely to impose very great penalty on small businesses. Larger businesses which have a great backlog of assets and working capital are not likely to be affected by this to the extent that it would ruin their business but for a small business, and its ability to get working capital, this will impede that.

Senator Cook: It will restrict his borrowing powers and will make it more expensive at the same time.

The Chairman: There is the other point with respect to which we are attempting to gather statistics. That is that in the provinces in which the Orderly Payment of Debts Act is in force, Part X of the present act, I told you the other day that in the present act we have Part X, which is really the Orderly Payment of Debts. It was to become effective in any province if such province, either by statute or Order in Council, adopted it. Certain provinces adopted Part X and the history of their experience would be very valuable to us. We have been endeavouring to gather it, but have not yet been successful. It does seem a strange transition. Obviously when it was included as Part X in the present act they did not feel secure about the validity of including it and making it enforceable under the Bankruptcy Act. So the provinces were told that the machinery was available and by adopting it they would have a method of orderly payment of debts. This time it has been written directly into the bill.

Mr. Baird: Yes; the larger provinces felt the cost of administering the provisions would be too great for the benefit to be achieved and would not introduce it. The smaller provinces, Manitoba, Saskatchewan and Alberta, have introduced it but we have not been able to obtain statistics as to their experience yet, which we hope to do for you.

The Chairman: There is also the other question I asked you about. That is any reasonable assessment of the provisions of the bill and the number of administrators, for instance, that might be appointed. Are we able to make an

assessment of the probable cost of administering these provisions as opposed to the number of persons for whom this might prove to be a benefit? If there were only 3,000 individual bankruptcies in 1973 or 1974, of those individuals how many would be likely to benefit by the arrangement provisions? The administrator plays a bigger part in administering arrangements.

Mr. Baird: Yes.

The Chairman: That means we must appoint administrators and they must be paid. You spoke recently of an advertisement in the newspapers inviting responses for applicants to act as administrators. If the plan is to cost a substantial amount of money and benefit few people I believe we should obtain statistics with respect to it on which we would be able to base our judgment. There is no use in creating a magnificent structure which would benefit an insignificant number of people. At least that is the way I feel about it.

Senator Connolly: Mr. Chairman, would it be feasible to suggest that this portion of the transcript be copied specifically and forwarded to the Superintendent of Bankruptcy with the request that we be given the answers to this as we embark upon this study?

The Chairman: I am sure they have made studies of some kind.

Mr. Baird: I hope so.

The Chairman: Maybe if we can obtain the information ourselves we should do so; we know how to apply it and we are endeavouring to do that.

Mr. Baird: We will be required to rely on the office of the Superintendent of Bankruptcy, because most of the statistics will be there.

Senator Cook: With regard to status, Mr. Baird, you made some reference to a director of a bankrupt company. I do not see any reference here to that.

Mr. Baird: Once again, I have a memorandum with respect to that. I am sorry they are not all together but I have been working on it as we go along.

Senator Connolly: To return to the other point, Mr. Chairman, whether it is done by way of letter, or by telephone with the office of the Superintendent of Bankruptcy, it seems to me that that type of information is necessary to our study.

The Chairman: I suppose our staff could make an appointment and indicate the purpose of going into the office of the Superintendent and asking for the information to be made available. If there is any hesitancy about it, just tell us and he will invite them to appear before us as witnesses.

Senator Cook: I should not imagine there would be any hesitancy. I am sure the Superintendent would co-operate to the full.

The Chairman: I have no reason to believe he would not.

Senator Walker: No, I would say not.

Mr. Zwaig: If I could add another comment with respect to sections 199 and 200, in which investigations of the administrator are mentioned, the important point to bear in mind, as I mentioned earlier, is that the trustee now carries out the investigation and reports. The investigation under the new legislation, as I read it, will be carried out by the administrator. If you will refer to clause 201(2), that is reinforced by the words:

> A trustee who has information that he believes relates to any matter set out in sections 199 and 200 that is connected with a bankruptcy in which he is the trustee shall forthwith transmit the information to the administrator.

This reinforces the idea that the investigation is carried out by the administrator, regardless of the fact that there is a private trustee in the picture. It is based on the report of the administrator that a caveat is issued, or a director is deemed a bankrupt.

The Chairman: That is a certain amount of duplication.

Mr. Baird: There is no question about it, because the trustee is the one who will be closest to the affairs of the bankrupt and must ascertain details of its assets and liabilities and deal with the creditors. There is also the administrator, with no direct contact with the creditors, then required to make a report of the bankrupt. Two parties are performing similar functions.

Senator Connolly: Under the present act, when the trustee becomes vested with the assets his report is made to the bankruptcy court, is it not?

Mr. Baird: That is correct.

Mr. Zwaig: And to the Superintendent of Bankruptcy?

Senator Connolly: Yes, the Superintendent from the administrator and the court is the law-enforcing agency.

Mr. Zwaig: Yes.

The Chairman: I am not sure, senator, of how much authority is left to the court here.

Senator Connolly: That is the point to which I am coming.

The Chairman: Yes; maybe we should have some explanation in that regard.

Mr. Baird: The administrator is the person who makes the first decision as to whether or not a person should retain the status of a bankrupt. At the present time that decision is made by the court, whether or not the bankrupt is discharged, the discharge suspended, refused or made conditional. The first decision is made by the administrator under this bill and after that the bankrupt has the right to apply to the court to have that decision rescinded. So we have, in effect, an appeal from the administrator's decision to the court. There are, therefore, two parties, the court and the administrator, having to make that type of decision.

Senator Cook: Yes; the court only makes it by way of appeal, does it not?

Mr. Baird: Yes, under the present situation the court makes the initial decision. That is a duplication of effort alone, the fact that both parties have to pass judgment on it. However, I presume it is considered that some bankrupts will not appeal, therefore the court will have a reduced work load.

Mr. Zwaig: The question I would raise is where does the bankrupt obtain the money to appeal if the assets within

that 90-day period are vested with the administrator or trustee, or where he has to turn over the excess money he has earned over the $500?

Senator Connolly: It is a good question, unless his wife has it.

Senator Desruisseaux: Legal aid.

Mr. Baird: That is possible. At the present time bankrupts use legal aid for the purpose of applying for their discharge from bankruptcy and that would apply to this type of application.

The Chairman: I take it the right to go to court would be equally enjoyed by the debtor or by a creditor?

Mr. Baird: No, the creditors are not given any input or any right to go to go the court in the circumstances. It appears that only the administrator can be the opposing party to such an application.

Senator Cook: Would there be circumstances in which the creditor would be damaged by the indivitual going bankrupt?

Mr. Baird: It would be the reverse, senator. The creditor is damaged in the case where the creditor feels there should be an order for payment. If it is an automatic discharge after 90 days, then any obligation to pay stops after 90 days. In that respect, the creditor would be damaged. If he feels it is a case where there should be an order for payment made he should be given the right to apply to the court to force such an order for payment. A creditor is not given that right under the new bill.

Mr. Zwaig: And that is a right which the creditor enjoys under the existing act.

Senator Cook: The law respecting bankruptcy is supposed to be for the benefit of the creditor as well as the bankrupt.

Mr. Baird: Section 147 deals with the requirements of payment after discharge. I failed to put that in my memorandum. That section should be tagged on to the bottom of my memorandum under "Status of Bankrupt." It is the section that deals with this order for payment. It is only available during the period that the man is an undischarged bankrupt, to use our old language, and the administrator controls that.

The Chairman: To what extent does the administrator take over the functions performed by the registrar under the present act?

Mr. Baird: He takes over the function of passing of accounts, taxing accounts. At the present time, the Registrar in bankruptcy is a court official, and he approves and passes on trustees' fees and disbursements. He passes the trustees' accounts. The Registrar in Bankruptcy also taxes legal bills and determines the amount of the compensation. He also has the right at the present time to issue orders for the redirection of mail. Those are the three major areas of responsibility which the administrator will take over from the Registrar in Bankruptcy.

The Chairman: Are there procedures for bringing a motion on any matter that may arise in the estate to the registrar, or must you go before the court?

Mr. Baird: This bill would abolish the position of the registrar completely, Mr. Chairman.

The Chairman: I realize that. Having abolished the position of registrar, what I am trying to determine is the extent to which the duties of the registrar will be taken over by the administrator under the new bill.

Senator Cook: In other words, have they thrown out the baby with the wash water?

Mr. Baird: Most procedural matters that would be dealt with by the registrar will be dealt with by the Master of the Court, or the court itself, depending upon which province is involved. The normal procedure of each of the provinces would apply. They have not set up a separate bankruptcy court.

The Chairman: My reason for asking about the function of the court, and these other things, is that if you are not going to have a bankruptcy judge, then there is certainly going to be uncertainty in the administration of bankruptcy law. It is simply too much to expect every judge of Trial Division of the Supreme Court of Ontario, for example, to have any great familiarity with the Bankruptcy Act, or the proposed act, if and when this bill becomes law.

That was the case when there was one judge assigned to bankruptcy matters. This bill proposes to wipe out that practice. Instead of going to the registrar, you will go to the Master. The Master has an infinite number of duties to perform. All you have to do is to go up to the Master's office to realize how overloaded he is. If you want to bring a motion, you will then have to take any judge who is available.

The present system of having one judge assigned to handle bankruptcy matters and who is available to hear motions, and so forth, at certain times each month, seems to be a much more orderly system than what is being proposed. The present system seems to be designed to expedite the dealings with the estate and to make them quite simple.

As I understand the administrator's duties, he is acquiring powers that might, to some extent, be described as being arbitrary.

Senator Desruisseaux: That is right, and nowhere in the bill does it state the qualifications of the administrator.

Senator Connolly: I think it is fair to say, Mr. Chairman, that you have described the virtues of the present system, which involves the use of the registrar and a judge who specializes in bankruptcies. For that we are now being asked to substitute an administrative tribunal which will have the power—

The Chairman: Well, it is not an administrative tribunal, as I understand it. It is one person.

Senator Connolly: But he constitutes an administrative tribunal. It is one person and he is going to have all of the authority that the registrar has under the present system and, presumably, that the Judge in Bankruptcy had, except by way of appeal from him to the court, and there will be no one specific judge on the court assigned to deal with bankruptcy matters. In addition to that, he is also the great white father in that he also has some of the attributes of the trustee with respect to the bankrupt estate, does he not.

Mr. Baird: Under the proposed bill, he would do both the initial investigation and then make the decision. He would

have both an investigative function and a judicial function.

Senator Connolly: Have you any explanation as to why this very radical approach has been taken?

Mr. Zwaig: It is a rather confusing approach, senator. Here you have a Superintendent of Bankruptcy under the existing act who licences trustees as being qualified to practise as a trustee in bankruptcy and to carry out certain functions. On the judicial side, we have a registrar who is qualified to carry out certain judicial functions, subject to appeal to a bankruptcy judge.

What is being proposed now is that we do away with the registrar's function and do away with part of the duties which this man we licensed as a trustee in bankruptcy is entitled to carry out. We then have the bankruptcy administrator who, under certain conditions and circumstances, performs the duties of a trustee. The trustee, if he is a private trustee under the new bill, goes to the bankruptcy administrator to have his account taxed and passed. The bankruptcy administrator, the bill says, will be entitled to the same fees as a private trustee, and he goes to his own superior, the Superintendent of Bankruptcy, to have his bill taxed. We are doing away with this independent judicial officer who is really the check and balance between the practising trustees and, assuming the bankruptcy administrator is here to say, the administrator and the Superintendent of Bankruptcy.

I agree with you, senator. We are doing away with a system that works, and we have had no explanation.

Senator Connolly: Were there abuses under the present system that led to this?

Mr. Baird: I think the major concern the Superintendent of Bankruptcy has had concerning the present system is that the trustee is not performing his investigative function properly. That is why he is turning that role over to the administrator. That is a concern I have heard expressed in the past, that the trustees were doing a very good job in realizing on assets and generally distributing them among creditors, but they were falling down in their investigative role, dealing with conduct of a bankrupt and whether or not he is subject to censure. That is the reason that I think is behind these suggestions.

Senator Connolly: Did not the provision of inspectors who are appointed by the creditors help at least to prevent any collusion between the trustee and the bankrupt?

Mr. Baird: Yes.

Senator Connolly: Not enough?

Senator Cook: There was no profit in it, that was the point. There was no profit in investigating the conduct of the bankrupt.

Mr. Baird: That is correct.

Senator Cook: The profit was in realizing the assets and distributing them and getting fees, a percentage.

Senator Connolly: Why throw out the baby with the bath water, as Senator Cook has said? Could it not have been done by appointing somebody on behalf of the Superintendent of Bankruptcy to do this investigative work where required?

Mr. Zwaig: There is a provision in the existing act, which is one of the 1966 amendments, which gives the Superintendent of Bankruptcy the investigative powers he asked for at that time. However, there is a slight catch. The office of the Superintendent of Bankruptcy will investigate only when they are requested to by inspectors, and when there are no dollars available in the estate for investigation. If there are dollars in the estate and if the inspectors, in their wisdom, choose not to investigate, the Superintendent of Bankruptcy will not do an investigation on his own.

Senator Connolly: Surely it is a matter of public policy that the Superintendent of Bankruptcy should.

The Chairman: That change could easily be made without all this machinery.

Mr. Zwaig: Yes, it can.

Senator Connolly: This is very radical.

The Chairman: It does strike one as an unusual situation to find that the administrator would have two capacities. He is the one the debtor who is looking for an arrangement of some kind will go to, and the administrator will propound the arrangement and submit it to the creditors.

Mr. Baird: It is even worse. If the creditors oppose the administrator's arrangement, it is the administrator who decides whether that arrangement will go through or not.

Senator Connolly: He makes a judgment on his own?

Mr. Zwaig: That is right.

The Chairman: He makes the arrangement and if the creditors do not like it he then rules, "That is it." What answer could you expect him to make, if it is his proposal, if the creditor opposes it, but, "This is it."

Senator Connolly: I think a very serious problem arises out of the fact that you are dismissing all the powers that are given to the registrar and to the judge in bankruptcy. To take these people out of the administration of the bankruptcy law is a pretty radical departure. I think that has to be justified, and if an attempt is made by the administration to justify it perhaps we should be talking to some of the more experienced registrars or judges in bankruptcy as to the wisdom of this step.

The Chairman: I can tell you that at a later date, certainly before the end of June, but not much before, I expect that we will receive at least two briefs that will be most informative, one from the chartered accountants and one from the Toronto Board of Trade. The reason I have such confidence is that becuase on both those committees Jack Biddell is a guiding force. Jack Biddell is the senior man at the Clarkson, Gordon Company, and the one who is recognized as an authority in the field of bankruptcy, so much so that in 1966 when we were dealing at that time with amendments I asked Mr. Biddell who had appeared to make representations, if he would stay on while we were considering all the clauses of that bill, which he did, and we had the benefit of his advice at that time. There is no question about his capacity and knowledge, and I am satisfied that those two briefs will be very informative. The Canadian Bar Association is supposed to be working on a brief too. I would figure, knowing that Mr. Biddell had an important hand in the preparation of those briefs, that we will get a lot of valuable information, which will

be based on experience and judgment, because he has been in this field for a long time.

Mr. Baird: I have had the opportunity of speaking to lawyers from Winnipeg and Alberta who have been involved in their bankruptcy courts, and they are perfectly satisfied with the way their courts are operating at the present time. They say they are getting better service than they would in normal civil proceedings. This is my experience in Ontario.

Mr. Zwaig: And my experience in Quebec and the Maritimes.

Senator Cook: I have noticed a great tendency for the civil service to be excluding the courts and taking more and more power unto themselves. We have had that in act after act after act.

The Chairman: Yes, and we have had to check it in some places. There is no reason why we should not consider doing it here.

Senator Cook: They are very apt to do away with the right of appeal to the courts. In this case they have not, because we have the administrator.

Senator Connolly: Which is the ministry responsible for this bill? Is it the Department of Consumer and Corporate Affairs?

The Chairman: That is the department, yes.

Senator Desruisseaux: It seems to me that when they have a study group on proposals for a bill of this sort, they should at least consult people who know something about it more than they do. In this case the panel consulted only one person who had experience with bankruptcy, if I remember correctly.

Senator Connelly: That is right.

Senator Desruisseaux: There were two professors. I do not object to that at all. They should be there to put forward new ideas, but they should not ignore, as is happening in most cases, people who are directly connected with it, and authorities connected with the bill and the principle of it. I think this is wrong. They should learn to consult these people.

The Chairman: We will certainly have opportunities to deal with that by the time we are through with this study. It makes the study very important, so that we know in which direction to look. We will certainly have the opportunity to examine the departmental officers. As a matter of fact, I would prefer not to examine them until after we have heard the submissions, if that is a practical thing to do. I think the only push on us on time is the summer recess. They talk about June 30. My own guess is that the sittings will go through until the middle of July. If by any chance we were in a position to formulate an interim report, even with some of the more glaring of these things discussed, I am sure that when the department proceeds in the fall you will find our recommendations reflected in the bill they will then present.

You will remember the way it was done with Bill C-2. We presented our report after; we had sittings in November and December of 1974; there were observers here; the record of all our committee meetings was available, and the result was a flock of amendments that the minister had not proposed to the house when he introduced the bill, but which he filed with the committee when the bill was referred to the committee of the other place. There was a whole series of amendments, a very substantial number of which were based on the points which were developed in this committee. Since it is the same minister he may follow the same procedure. It may be possible that we will be ready to do that. Who knows, if we could steal a few extra sitting days it might be helpful. What else do we have today?

Mr. Baird: The last topic I have today concerns the obligations of officers and directors under the new bill. Do you know whether you were able to circulate the memorandum I have prepared? I had some Xerox copies made.

The Chairman: Yes. Mr. Jackson may have them. He showed them to me this morning. Yes, there they are. This is under the heading of "Obligations of officers and directors." It is a very important part of the bill.

Senator Connolly: Mr. Chairman, I think we received that this morning. Before we start on this second memo, I was unable to be here last week. I have been speaking to Senator Buckwold. Did you consider at that time—

Senator Buckwold: I was also absent.

Senator Connolly: . . . what was wrong with the present act and why these changes are being introduced? Did you look at it in a sort of global way? If that was not done, that is fine. We are now taking certain areas of interest, finding out where the problems are.

The Chairman: We decided to operate on what we called subject matter. The same subject matter may be dealt with in various parts of the bill. For anyone reading the bill, it is a bit of a job, with the kind of indexing there is, to go from one part to a couple of parts further over to find out what are the items dealing with this particular subject matter. We have done it by subject matter, but we still give you the page numbers and sections.

Senator Buckwold: The point I raised, in speaking to Senator Connolly, was whether there was a general discussion to give us an overview, which I do not have at the moment—a five-minute statement from our technical people on what is wrong with the present act. I do not mean in detail. What are they trying to achieve in the new act, in a general way? I would find that beneficial.

The Chairman: I asked Mr. Baird what he thought about the philosophy in the new bill. He did give an answer. You may not have been present at the time. I am sure Mr. Baird could repeat it. But let us clearly get at the object. If you are asked to describe the aim and purpose, the rationalization, of the new bill, you would like to know the answer. You would also like to know the areas in the bill that are unusual and new, what are the provisions on those points in the present law, and is any change justified. That is the sort of answer you want, is it not?

Senator Buckwold: I did not wish to go into that much detail. I was merely looking for a two- or three-minute statement on whether our present law is working, or whether it is a disaster. What are the key issues? What is wrong with the present law, and how will the new law attempt to improve it?

The Chairman: We went over this in 1966. We held a lot of hearings. The bankruptcy situation in Montreal was very bad. They were determined they would try to clean it

up. We put in an amendment to the bill in committee. At that time, were you not government leader in the Senate, Senator Connolly?

Senator Connolly: Yes.

The Chairman: We put in an amendment to the bill providing for solicitor-client privilege. That upset the minister very much. I was invited over to his office at least half a dozen times. He explained that it would defeat their plan to clean up the situation in Montreal. He came before the committee and gave the same explanation, that if they could not get at the offices and records of some of the lawyers they could not hope to clean up the situation in Montreal. He begged us to withdraw the amendment, and said that within a year there would be a new bankruptcy bill. We have waited a long time for that new bill. We have waited since 1967. The amendments in 1966 were designed to deal with fraudulent bankruptcies. Do you agree with that?

Mr. Baird: Yes; there is no question about that.

The Chairman: The place which they were aiming for, in a particular way—not necessarily the whole way—was Montreal. The department acknowledges that it was able to clean up the situation there. I do not know whether you can say there is a need for a new bill. I do not know what Mr. Baird would say to that. Do you think there is a need for a new bill, or that amendments could make the necessary changes?

Mr. Baird: I tnink that amendments could make the necessary changes. I do not see the need for the radical new bill which we have before us. The bankruptcy administration is working well. I do not say extremely well, because it can always be improved. The Superintendent of Bankruptcy has done a good job. He has remedied problems which have existed. One problem was that a person could not afford to go bankrupt in some instances. It seems incredible, but that was the case. The fee of a private trustee was about $550. If a man could not afford that, he could not go bankrupt. He has improved that situation. He has appointed a federal trustee who is now handling small debtor bankruptcies for $50. So that problem has been remedied. He has improved his licensing. He has cancelled licences of trustees who have not performed their functions properly, and has introduced increased investigation into bankruptcies, which is an improvement.

The weakness in the present act is that there is no provision for a consumer debtor, wage earner to make arrangements with his creditors. That is one provision we are trying to introduce into the existing act—some way whereby a man, a wage earner, can make an arrangement for payment over a period of time. They are trying to solve that problem.

Senator Molson: What about delays today? Is the situation fairly good, from a time point of view?

Mr. Baird: This is a human problem as opposed to a statutory problem. You have the problem of administering bankruptcies, the trustees in bankruptcy, how fast they are performing their functions, how soon they will realize on their assets, whether they will make their distribution to creditors—

Senator Molson: Is there any reason to think that the new act will speed that up?

Mr. Baird: No. It will not change it at all.

Senator Molson: Then that is one advantage that does not exist.

Mr. Baird: The other disadvantage they are trying to overcome is in receiverships. The tenor of our commercial and solvency world has changed since 1966. Banks are now taking debentures, floating charge debentures, as security for their indebtedness, to cover all the assets. A realization is being more and more conducted by the secured creditor realizing on the assets, and unsecured creditors are not receiving information concerning how the secured creditor deals with the assets. They are trying to correct that problem.

The Chairman: That could be corrected by an amendment to the bill.

Mr. Baird: Yes. They also included provisions with respect to receiverships, most of which are very good. They are not onerous, but they give creditors rights to find out what is going on. That is the major complaint my clients tell me, that if they are trade suppliers and one of their debtors goes into receivership they cannot find out what is happening, because there is no statutory provision requiring them to be provided with information. I do not think we need a radical change. It has the effect of abolishing all previous court decisions, so we are starting out from scratch. It will create a long period of uncertainty, until the courts have an opportunity to interpret the new wording. I think our present act is working well. It can be improved, but I do not feel that it needs the radical surgery proposed by this legislation.

Mr. Zwaig: While I go along with the comments of my confrère, Mr. Baird, I think that some of the proposals are good and probably can be incorporated into existing legislation. I might read a comment in the white paper tabled in the House of Commons on December 18, 1970. At that time there was a complaint that the creditors were really not interested in the administration of bankrupt estates. They commented as to the reason why, as follows:

> The apathy of the creditors to take part in the administration of an estate in bankruptcy can very well be explained by reason of crown priority. Very often for the creditors to involve themselves in the administration of the estates is the equivalent to them volunteering as agents of the public Treasury.

Now the elimination of crown priority has been introduced into the bill. I think that will interest creditors much more than the administration of the estates. The introduction of the consumer arrangement is an excellent idea that would interest the small wage earner. The introduction of the official receiver as a public trustee has already been done. All they really have to do is increase the exemption limits which limit the earning capacity that an individual must have before he can qualify for the $50 bankruptcy. However, I agree that the changes are very radical and drastic and on that basis I think the present act can be amended.

Senator Desruisseaux: On page 2 of the Proposed Bankruptcy Act, 1975, there is a list saying that the bill incorporates existing insolvency legislation presently included in the Winding-up Act, the Companies' Creditors Arrangement Act and the Farmers' Creditors Arrangement Act, all of which it proposes to abrogate.

Senator Connolly: Mr. Chairman, this afternoon we have expressed some concern with respect to the fact that

this bill will, in fact, abolish the powers of the registrar and the judge in bankruptcy as they exist under the present legislation. I believe we should consider, before approving an idea of this type, very seriously before we do so. However, now we are told that the changes in the legislation are so radical that the body of jurisprudence that has been built up under the previous act and its predecessor would all now go out the window. I suppose literally that is not quite true, but for practical purposes it may very well be true. If we are to have a new type of administration, there will be a new set of principles and we must have decisions before we know where we are going.

The Chairman: And a new language.

Senator Connolly: Yes, a new language, new names, administrator rather than registrar and so on. This will be very disconcerting, in my opinion, to broad sections of the business community. It will be very upsetting to small businessmen who, perhaps, are more affected by bankruptcy and have more to fear from it than larger businesses.

The Chairman: Senator Buckwold, did you get your response?

Senator Buckwold: Yes; this is very helpful, because it is the general impression of the bill.

The Chairman: There are very radical departures.

Senator Buckwold: I can see that. Would you say that this basically is consumer-oriented, rather than business-oriented, in direction?

Mr. Zwaig: In one instance, yes; part of it is consumer-oriented.

Senator Buckwold: Do you think the major cause of concern of the minister would be that of the small businessman who goes bankrupt?

Mr. Zwaig: I think we can develop insolvency or bankruptcy legislation for the wage earner debtor, which is not covered specifically in the present act.

The Chairman: Senator Buckwold, I do not know whether you were present this morning when we were discussing the position of wage earners and the top priority they are given here as against the secured creditors. I made a suggestion this morning that there is no reason why there should not be a levy on all wage earners in Canada. Actually it would work out to be an insignificant amount, which would establish a wage assistance fund, out of which the wage earners who suffer in a bankruptcy situation could be reimbursed, rather than reducing the amount of perhaps the value of the secured creditor's position. There is no reason why they should have to pay if they have securities in proper form. Why should there be inroads on their security to pay the preferred position of the wage earners?

Senator Buckwold: Yes, I heard that and will comment on it later, because I do not think the government in its wisdom would add further deductions to the pay cheques of employees just on a matter of general principle. Good as the idea may be, they might get a warmer response to the suggestion of adding certain payroll costs to the companies by means of which the companies would do it, rather than individual wage earners.

The Chairman: Actually, according to Mr. Baird and Mr. Zwaig, their best estimate would be that the amount of that levy would be relatively insignificant.

Senator Buckwold: I realize that, but no matter how insignificant it would be, I do not believe anyone wishes any more deductions to be taken from the cheques of employees, even if it were only 10 cents per month.

Senator Molson: Including the employees.

Senator Buckwold: Yes, including the employees.

The Chairman: It is a proposal which I think we should consider. If we look on the other side of the picture, from the position of the secured creditors, we should try to find some logic other than the doctrine of socialism for making a secured creditor give up any part of his security to pay a wage earner because the company goes bankrupt.

Senator Buckwold: I am not arguing philosophy at all; you are quite right in your proposal. I am just saying that from the point of view of government acceptance I am not sure that they would like to see additional deductions.

The Chairman: But this is what the bill does. The bill is in relation to the secured position of the wage earners being increased to $2,000 and really provides an erosion on the security of the secured creditor.

Senator Buckwold: I appreciate all that.

The Chairman: Now try to argue the pros and cons of that.

Senator Molson: What would be the global numbers we are discussing for the small bankrupt?

The Chairman: I do not know. In 1973 I believe there were approximately 3,000 individual bankruptcies.

Senator Molson: So it is a few million dollars.

The Chairman: If that.

Senator Beaubien: Is there anything in the present law to protect the workers if a firm goes bankrupt and they do not receive their wages?

The Chairman: They get priority for $500.

Mr. Baird: That is correct.

Senator Beaubien: It is being increased from $500 to $2,000. Is that the only change?

Mr. Zwaig: Together with increasing it to $2,000, this bill will give the wage earner super security. In other words, the wage earner will rank ahead of the secured creditor.

Mr. Baird: At the present time, wage earners rank behind secured creditors. Because the secured creditor is entitled to all of the assets, there is nothing left over for the wage earner. This provision is an attempt to overcome that problem. Another solution would be the indemnity benefits proposed by the Chairman.

Senator Connolly: Another provision in respect of wage earners under the present bankruptcy legislation is the personal liability of directors up to a certain amount. That is continued, is it, in the new bill?

Mr. Baird: Yes, it is.

Senator Connolly: I have often wondered how much good that is to the wage earner.

Mr. Baird: I have only sued once under that provision in 15 years. It is used very seldom because by the time the company goes bankrupt, frequently the directors have no assets left. Because they guaranteed the bank, they have lost everything. That is the case in a number of situations.

Senator Connolly: I am just wondering whether this is a provision worth keeping.

The Chairman: The committee just recently approved the continuance of just such a provision in the Canada Corporations Act. I believe under that provision the directors remained liable for two years.

Mr. Baird: Yes.

The Chairman: That type of provision was in earlier corporations acts.

Senator Connolly: I can remember back in law school wondering how good this provision was for wage earners. Personally, I do not think it is a useful provision.

The Chairman: Well, Mr. Baird says that he knows of one case under that provision in about 15 years. If the house falls down, the directors are usually wrapped up in the wreckage.

Senator Buckwold: Either that or they disappear.

The Chairman: Yes, if they belong to the category of those who propound fraudulent schemes.

Senator Buckwold: Personally, I support every protection for the wage earner, even above the secured creditor, up to a maximum amount. I think that is an admirable objective of the bill.

Senator Desruisseaux: The extent of the responsibility is much more than we think, because the directors are jointly and severally liable. Quite often, directors come from within employees and only a few are what might be termed outside directors.

Mr. Baird: They are the ones who will suffer.

The Chairman: We have not dealt with the liability of directors as yet. It is now a quarter of four. How much longer do honourable senators wish to sit?

Senator Beaubien: Are we meeting tomorrow morning?

The Chairman: We will be meeting tomorrow morning at 9.30 on Bill C-2, at which time we will have witnesses appearing on behalf of the International Air Transport Association.

We will not hear from these witnesses tomorrow. We could not justify holding them over for another day, in view of the limited time we might have available. I would suggest that next Wednesday we have a full run at it. We will then, as I say, continue with the obligation of directors. I have a list of subject matters that will be dealt with; we will have briefs on each point, so we will be able to move along reasonably fast.

The committee adjourned.

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FIRST SESSION—THIRTIETH PARLIAMENT
1974-75

THE SENATE OF CANADA

PROCEEDINGS OF THE

STANDING SENATE COMMITTEE ON

BANKING, TRADE AND COMMERCE

The Honourable SALTER A. HAYDEN, *Chairman*

Issue No. 43

THURSDAY, JUNE 12, 1975

Sixteenth Proceedings on:

"The advance study of proposed legislation respecting the Combines Investigation Act, competition in Canada or any matter relating thereto."

(Witnesses: See Minutes of Proceedings)

29387—1

THE STANDING SENATE COMMITTEE ON BANKING, TRADE AND COMMERCE

The Honourable Salter A. Hayden, *Chairman*

The Honourable Senators,

Barrow	Hays
Beaubien	Laird
Buckwold	Lang
Connolly (*Ottawa West*)	Macdonald (*Cape Breton*)
Cook	Macnaughton
Desruisseaux	McIlraith
Everett	Molson
*Flynn	*Perrault
Gélinas	Sullivan
Haig	Walker—(19)
Hayden	

**Ex officio* members

(Quorum 5)

Order of Reference

Extract from the Minutes of the Proceedings of The Senate, October 16, 1974:

"With leave of the Senate,

The Honourable Senator Hayden moved, seconded by the Honourable Senator McDonald:

That the Standing Senate Committee on Banking, Trade and Commerce be authorized to examine and report upon any bill relating to competition in Canada or to the *Combines Investigation Act,* in advance of the said bill coming before the Senate, or any matter relating thereto;

That the Committee have power to engage the services of such counsel, staff and technical advisers as may be necessary for the purpose of the said examination; and

That the papers and evidence received and taken on the subject in the preceding session be referred to the Committee.

The question being put on the motion, it was—
Resolved in the affirmative."

Robert Fortier,
Clerk of the Senate.

Minutes of Proceedings

Thursday, June 12, 1975
(58)

Pursuant to adjournment and notice the Standing Senate Committee on Banking, Trade and Commerce met this day at 9:30 a.m.

SUBJECT: "The advance study of proposed legislation respecting the Combines Investigation Act, competition *In Canada or any matter relating thereto"*.

Present: The Honourable Senators Hayden (*Chairman*), Barrow, Beaubien, Buckwold, Connolly (*Ottawa West*), Cook, Desruisseaux, Flynn, Haig, Laird, Macdonald (*Cape Breton*), McIlraith, Molson and Walker. (14)

In Attendance: Mr. R. J. Cowling and Mr. John F. Lewis, Advisers to the Committee.

Witnesses:

International Air Transport Association:

Dr. J. Shomka-Gazdik, Q.C., Assistant Director General.

The witness explained to the Committee the problems relating to the Association inherent in Bill C-2 and following such explanation he presented to the Committee a proposed amendment adding a new Section 32 (8) to the Bill.

After discussion and upon motion of the Honourable Senator Laird, it was *resolved* that the Committee adopt the proposed amendment as set forth below.

> "In a prosecution under subsection (1), a court shall not convict the accused if the conspiracy, combination, agreement or arrangement pertains to any contract or agreement affecting air transportation and relating to the pooling or apportioning of earnings, losses, traffic, service, or equipment, or relating to the establishment of transportation rates, fares, charges, or classifications, or for preserving and improving safety, economy, and efficiency of operation, or for controlling, regulating, preventing, or otherwise eliminating destructive, oppressive, or wasteful competition, or for regulating stops, schedules, and character of service, or for other cooperative working arrangements, including the collective selection and administration of agencies for the sale of air transportation; provided that such contract or agreement to which the accused is a party shall have been filed with the Canadian Transport Commission."

It was further agreed that the Chairman present a further Interim Report incorporating the above amendment.

At 10:25 a.m., the Committee then proceeded *in camera*.

The Chairman, assisted by the advisory staff, informed the Committee of certain meetings held between himself and the Minister of Consumer and Corporate Affairs, together with the Ministers officials, and meetings held between the departmental officials and the Committee's advisory staff, relating namely to the Interim Report of the Committee and the amendments made to Bill C-2 in the House of Commons Committee.

At 12:20 p.m., the Committee adjourned to the call of the Chairman.

ATTEST:

Frank A. Jackson,
Clerk of the Committee.

The Standing Senate Committee on Banking, Trade and Commerce

Evidence

Ottawa, Thursday, June 12, 1975

The Standing Senate Committee on Banking, Trade and Commerce met this day at 9.30 a.m. to examine and consider the advance study of proposed legislation respecting the Combines Investigation Act, competition in Canada or any matter relating thereto.

Senator Salter A. Hayden (*Chairman*) in the Chair.

The Chairman: Honourable senators, we have one submission this morning, that being on behalf of the International Air Transport Association. Dr. Thomka-Gazdik, Assistant Director General of IATA, will make the presentation.

Dr. J. Thomka-Gazdik, Q.C., Assistant Director General, International Air Transport Association: Thank you, Mr. Chairman. May I first of all thank you and your committee for giving me an opportunity to present to you a point of view that the International Air Transport Association brought to the attention of the Minister of Transport, the Minister of Consumer and Corporate Affairs, the Minister of Justice, the Secretary of State for External Affairs, as well as your committee.

With your permission, I would first like to call the problem with which we are concerned under Bill C-2 an oversight on the part of those sponsoring the bill. Bill C-2 will, if passed, extend the application of the Combines Investigation Act to services, whereas heretofore it was limited to goods and articles. Air transport is a service, and because of this proposed extension it would fall under the application of Bill C-2.

There are hundreds, if not thousands, of agreements between Canadian air carriers and foreign air carriers, all of which will come under the new act. These agreements could be construed as offences under the new act provided they lessen competition or fix prices. In fact, they do fix prices, subject to government approval.

The situation in international air transport, briefly, is that after the Chicago Convention in 1945 failed to set up some sort of international regulatory agency, governments dealt with scheduled air services through bilateral air transport agreements. Canada has 23 such bilateral agreements with other governments, including, amongst others, the United Kingdom, France, Jamaica, Germany and Japan.

Senator Connolly: Do these agreements fix prices?

Dr. Thomka-Gazdik: These agreements determine certain control over air services in international air transport. They deal with the designation of carriers, the determination of capacity and the determination of the routes on which the carriers are to operate. They also provide in respect of rates, fares and charges, that these rates, fares and charges should, in the first instance, be determined between the designated airlines of the contracting parties in accordance with other airlines operating over the whole or part of that route, and such agreement shall, where possible, be reached through the rate-fixing machinery of the International Air Transport Association.

Agreements then further provide that the tariffs so agreed shall be subject to the approval of aeronautical authorities of both contracting parties. This type of clause appears in 14 of the bilateral agreements; five other bilateral agreements in which Canada is participating make only indirect reference to IATA, but they recognize the conference system as such; three bilateral agreements do not specifically refer to IATA; and one bilateral agreement does not contain a tariff clause of the nature I have just read out to you.

Senator Desruisseaux: Could you name these countries?

Dr. Thomka-Gazdik: I can, and I would like to file a list which I have with me, if you will permit that, Mr. Chairman.

Senator Laird: How many are there, in numbers?

Dr. Thomka-Gazdik: On the list I have 14 which refer directly to IATA; five which refer indirectly to IATA; three which do not refer to IATA, but contain a clause regarding rate-making; and one which does not contain a clause.

In order to permit you to look at the agreements, I would like to file three agreements which I chose at random. One is the agreement between Canada and the United Kingdom. That clause is word for word the same as I read out, and I have opened it at the part where the clause can be found. I would also like to file the agreement between Canada and the Government of the French Republic; and a more recent agreement, between Canada and Jamaica, which is dated November 4, 1970.

Senator Desruisseaux: Is there one with the United States?

Dr. Thomka-Gazdik: There is one with the United States also, but it is an older agreement, which is why I did not choose to file it with the Committee. It does contain the IATA tariff clauses.

The Chairman: Perhaps we should clarify the situation, Dr. Thomka-Gazdik. These agreements appear to be between the Government of Canada and the government of some other country.

Dr. Thomka-Gazdik: That is correct.

The Chairman: So that at that stage the agreement is at the level of government versus government.

Dr. Thomka-Gazdik: That is correct.

The Chairman: And the machinery for implementing is what? Where does IATA come into that?

Dr. Thomka-Gazdik: That is my next point, Mr. Chairman.

The Chairman: Thank you.

Dr. Thomka-Gazdik: You have heard the reference to the International Air Transport Association. The International Air Transport Association is a Canadian corporation by act of Parliament and only recently, this year, on the initiative of the Senate, there was an amendment extending the membership to non-scheduled carriers, whereas heretofore participation in it was limited to scheduled carriers. The International Air Transport Association set up in 1945 a traffic conference system and provided rules and regulations. This system operates on the unanimity voting basis. It would not be appropriate for me now to explain, unless you have specific questions, the details of the method under which this system operates. However, I should mention that, whereas in Canada you have 23 agreements, which I have listed, there are approximately more than 1,000 agreements which contain similar authorizations under which this system operates internationally, on a world wide basis.

Senator Laird: But they are all bilateral, I take it?

Dr. Thomka-Gazdik: They are all bilateral and they form a network within which these rates, fares and charges are contracted.

The Chairman: Would you say that IATA is an agency in carrying out functions provided for in these agreements?

Dr. Thomka-Gazdik: Mr. Chairman, I think this may be going too far. We like to believe that we have an authority, or recognition, on the part of governments, or a trust vested in the organization and in the carriers, to determine certain fairs, rates and charges in the first instance. However, all these agreements, negotiated through the conference system are always subject to government approval.

Senator McIlraith: One point should probably be clarified here. It is my understanding that they carry out activities only through the authority of the companies with the approval of the government, which makes a great difference in the terms of our legislation.

Dr. Thomka-Gazdik: You are quite correct, sir, it does make a difference, but the agreements between the carriers reached through the IATA conference system are subject to government approval, such as approval of the Canadian government, and we would have to look a little later this morning, perhaps, at the authority the Canadian Parliament has given to its regulatory agency for the approval of these agreements.

Senator Walker: When the agreements are approved, is it done by Order in Council?

Dr. Thomka-Gazdik: No, sir.

Senator Walker: Then how are the agreements approved?

Dr. Thomka-Gazdik: Well, sir, I ought to explain that historically.

Senator Walker: No, you do not need to explain historically; it is very simple. How are the agreements approved by the Government of Canada?

Dr. Thomka-Gazdik: In Canada the agreements are filed by the Canadian carriers with the Canadian Transport Commission. At the same time tariffs are filed. Tariffs are the contracts between the carrier, the passenger and the shipper, but they are on file with the Canadian Transport Commission. So, at the same time as the Canadian carrier files the agreement reached through the IATA Traffic Conference, it files its own tariff. The Canadian Transport Commission has certain authority over the tariffs, but the Canadian Parliament has heretofore not given authority to the Canadian Transport Commission to approve or disapprove the agreements which are reached through the Traffic Conference.

The Chairman: May I just amplify this: The Aeronautics Act, which is a statute of this Parliament and which has been held to be exclusively the jurisdiction of the federal government by the Supreme Court of Canada, in section 14 states:

> The Commission—

That is the Canadian Transport Commission:

> The Commission may make regulations—providing for
>
> (i) the disallowance or suspension of any tariff or toll by the Commission,
>
> (ii) the substitution of a tariff or toll satisfactory to the Commission, or
>
> (iii) the prescription by the Commission of other tariffs or tolls in lieu of the tariffs or tolls so disallowed;

Now, the neat problem arises in the last paragraph with the words "the prescription". I know it is the view of the Department of Consumer and Corporate Affairs that their legislation covers agreements made in relation to international rates. There may be a representative from that department present this morning because we told them this meeting was taking place. The question is as to what "prescription" means. Does it mean, to provide for? It has a number of meanings. The feeling, however, is that it does not go far enough to give the commission the right to fix rates. However, in the operation of international air carriage these agreements do provide for rates. They are filed with the commission, and I doubt if the commission has taken much, if any, action in the regulation of them. In other words, when the tariffs are filed they accept them. Is that not correct, Dr. Thomka-Gazdik?

Dr. Thomka-Gazdik: I do not believe that that can be stated so generally. The Canadian government has made, on a number of occasions, exceptions and reservations with respect to tariffs fileds pursuant to an IATA agreement.

The Chairman: I am attempting to clarify this situation. I keep referring to the Canadian Transport Commission and you keep referring to the Canadian government. Now, you do have a treaty or agreement between the Canadian government and the government of some other country.

Dr. Thomka-Gazdik: That is correct.

The Chairman: Then the authority to disallow rates and to substitute other rates is vested in the Canadian Transport Commission.

Senator Connolly: Would that be only for domestic rates?

The Chairman: There are international rates. While we are not concerned with this at the moment, if the authority of the commission does not go so far as to permit them to fix rates, then at some stage there should be an amendment to the Aeronautics Act.

Senator Walker: That is why I asked that question. We still do not know what the witness means by saying that it has to be approved by the Canadian government. He told us in another part of his evidence that the Transport Board has not interfered; they filed the tariff but the board has not interfered.

The Chairman: As I understood him, you start with a treaty or an agreement between Canada and another country where they are going to deal in international air rates. There are provisions in these agreements relating to tariffs, and I think these agreements provide the authority for the Aeronautics Act and the Canadian Transport Commission to deal with the actual matter of tariffs.

Dr. Thomka-Gazdik: Yes.

The Chairman: That is the chain of succession.

Senator Desruisseaux: Before we go any further on some of these points, might I ask this. Do the tariffs extend beyond your membership? Do they apply to somebody else outside your membership?

The Chairman: Yes. There was an amendment in 1955, was there not?

Senator Desruisseaux: Are your set tariffs, whatever they may be, applied generally or only to the members of your association?

Dr. Thomka-Gazdik: They apply only to members who form our association in the agreements. The agreements the IATA Conference reached are agreements between the carriers who participated. Those carriers in Canada file the contents of the agreements in their tariffs; they are filed individually by the carriers—Canadian Pacific or Air Canada. Those tariffs are the only things that the Canadian Transport Commission at present has authority to deal with. A moment ago the chairman read out the extreme points of authority they have. There is nothing in the Aeronautics Act that gives the Canadian Transport Commission authority to deal with the agreements to which both Air Canada, Canadian Pacific and the other partners, such as British Airways, Air France and Lufthansa, are parties to. Those agreements remain naked under Bill C-2 extension to services and maybe subject to prosecution because they deal with prices.

Mr. R. J. Cowling, Legal Adviser to the Committee: You mean the agreements that lead up to the making of the tariffs?

Dr. Thomka-Gazdik: That is correct.

Mr. Cowling: It is the tariffs that are filed, not the agreements.

Dr. Thomka-Gazdik: That is correct. There is no provision under the Aeronautics Act giving CTC any power to deal with the agreement.

Senator Desruisseaux: What about the charter companies?

Senator Laird: Such as Wardair.

Dr. Thomka-Gazdik: The charter companies may or may not have these agreements. At this stage they have no agreements through the IATA Conference. I therefore cannot speak for them.

The Chairman: The amendment to your IATA statute that was made a few years ago does permit the charter services to come in.

Dr. Thomka-Gazdik: That is correct.

The Chairman: I still want to get to the point about which we are concerned. If the Aeronautics Act provisions do not permit the Canadian Transport Commission actually to fix the rate—and this is the interpretation IATA has put upon it, which may be the interpretation, depending what the word "prescription" means—if these agreements are subject to Bill C-2—and so far the indication to us, and certainly to you when you were talking to the officials of the department, is that Bill C-2 extended to cover the tariff agreement—our concern is that this is an important, necessary and essential service at the level of government; it is regulated and therefore should be an exemption.

I can tell you that in connection with shipping a statute was passed by Parliament in 1969-70 entitled the Shipping Conference Exemption Act. In respect to shipping, there was a provision in that agreement entitled, "Non-Application of Combines Investigation Act." Section 3 reads as follows:

> Subject to this Act, nothing in the Combines Investigation Act shall be construed to apply to any contract, agreement or arrangement between members of a shipping conference to the extent that the contract, agreement or arrangement
>
> (a) requires the use by members of the conference of tariffs established by the conference.

It then goes on and has other provisions. With respect to shipping, Parliament has granted a statutory exemption from the provisions of the Combines Investigation Act. In effect, this is what is desired in relation to IATA and the establishment of international air rates.

Senator Laird: Can we not do it through amendment to Bill C-2?

The Chairman: We can do it through amendments providing an exemption in Bill C-2, yes.

Senator Laird: Then let us do it.

The Chairman: I think I told you yesterday, as Dr. Thomka-Gazdik has told you this morning, that his letter raising this issue, and the briefs in support of it, went to a number of ministries; they went to the Departments of Consumer and Corporate Affairs, Justice and Transport. I discussed this matter with Mr. Ouellet, the Minister of Consumer and Corporate Affairs. I asked him if he was going to provide for an exemption in Bill C-2. He said he did not see how he could do it. I did not understand the language of procedures in the Commons as well as I should, and certainly not as well as Senator McIlraith understands them. Mr. Ouellet was suggesting that since this bill had been authorized to move forward only in relation to amending the Combines Investigation Act and certain other acts, there is a series of steps that has to be taken that would prolong for some time the consideration

and finalization of Bill C-2. Perhaps I was a little bold, but I was talking to him on the phone and said, "I am satisfied that if the government does not take a hand and grant an exception, the Senate committee will do it."

Senator Laird: Absolutely.

The Chairman: That is where I left it.

Senator McIlraith: Unless we do it, one of the main purposes of IATA, as developed in the 'forties and 'fifties, is being completely negated.

The Chairman: That is right.

Senator McIlraith: It is as simple as that.

The Chairman: The question is that simple.

Senator Walker: Why would they not do it themselves? Would it be because they considered it unhelpful politically?

The Chairman: No. It is not a question of whether or not they would do it themselves. They feel the procedures involved in the Commons in providing an amendment for an exemption at this time require a lot of formalities and would delay the passage of Bill C-2, which is such a treasured item to the department, and they do not wish to have its passage delayed. We can amend, and the Commons will have to consider it. They will then have to make the decision whether or not they are going to grant exemption.

Senator McIlraith: I would assume that some of that precedural difficulty may have arisen from the change in the rules two or three years ago whereby they do not bring the bill before the whole house in committee of the whole when there is an opportunity to amend sections directly. They would rather do it by notice on the Order Paper at the report stage of the standing committee of the house. It is quite a complicated procedure. I suspect that is where the difficulty lies in the House of Commons, although that is just my own supposition.

The Chairman: I think that is about it. If they have got themselves locked in under their rules so that they cannot deal with an essential service of this kind, then we can deal with it as we are not locked in.

Senator Laird: Why cannot we introduce a separate bill contemporaneously with, say, giving third reading to this bill?

The Chairman: No. That would delay things. The bill would then have to go over to the House of Commons. We have had the submission. I think the proper way at this time is to add an exemption in the bill to this particular service.

Senator Connolly: Mr. Chairman, did the witness receive any reaction to his submission from the other ministers?

Dr. Thomka-Gazdik: Mr. Chairman, to date I understand only that some replies are in the mail or in preparation; but I have seen none yet.

Senator Walker: It takes a week or two for a letter to get here.

The Chairman: That submission was made under date about the middle of May?

Dr. Thomka-Gazdik: Yes.

The Chairman: Last week, when I asked the Minister of consumer and Corporate Affairs what he was going to do, he said he was writing, or had written, a letter to the Minister of Transport directing his attention to it. But the Minister of Transport had already received a letter from IATA, as did other ministers, enclosing a brief.

Senator McIlraith: Is there a submission of that nature before us? I do not appear to have it. When was the submission made to us? Do you have the date?

The Chairman: Since Dr. Thomka-Gazdik knew Senator Macnaughton very well, he wrote a letter to Senator Macnaughton attaching a brief. Senator Macnaughton said that it should properly be sent to the Chairman of the Standing Senate Committee on Banking, Trade and Commerce, and he therefore sent it to me, advising Dr. Thomka-Gazdik that he had done so and that this was the proper place to address it.

I have since spoken to Dr. Thomka-Gazdik over the phone, and I also arranged for Dr. Thomka-Gazdik, who is located in Montreal, to talk with our legal adviser, Bob Cowling. That is the way the thing finally came before us. I felt it should not be allowed to fall between a couple of stools. It is too important a matter.

Senator Walker: "Stools" in the regular sense.

The Chairman: Yes.

Senator Molson: There would be no thought of incorporating the shipping conference exemption into the bill at the same time, I presume? I am wondering whether we will end up with one special act for the shipping conference, and then have an exemption in this act for the airlines.

The Chairman: As the poets might say, "What is another exemption among friends?" These are exemptions. There are already a number of exemptions in C-2 which have been carried through from the Combines Investigation Act. You would be adding another exemption.

Senator Laird: In what section do the exemptions appear?

Mr. Cowling: They are mostly in section 4, senator. You have fishermen, and groups of employees, for example.

Dr. Thomka-Gazdik: Mr. Chairman, if I may add, there are some in section 32. For instance, exports have been exempted. I would like to point out that to some extent this is similar to exports, to the extent that Canadian carriers sell transportation overseas—that is, exporting their services overseas and producing foreign currency. There is a similarity.

Mr. Cowling: Except that the price is being paid by Canadians. Is that no so?

Dr. Thomka-Gazdik: Not if you sell in London to Britishers, or in France to Frenchmen, who are coming here and using the services of Air Canada or CP.

Mr. Cowling: To that extent, would you already be covered by the exemption that is in the act?

Dr. Thomka-Gazdik: I would then interpret transport to be export. I am already fraught with the difficulties of interpretation under the various existing acts.

Senator McIlraith: I would like to follow that up a little more. Here in the international transport business, the price of the export is being paid, in the main, in so far as we are concerned, by Canadians in Canada. Presumably it is only the U.K. travellers who would be paying in the U.K., or French travellers in France, so it is different from ordinary exports of commodities. Exports of commodities are paid for abroad, outside the country, by non-Canadians.

The Chairman: As I understand the way Air Canada operates, if I want to fly to London, I can buy a return ticket here and pay in Canadian dollars; or if I only bought a one-way ticket to London, I would pay here in Canadian dollars and when I was buying the return part of the ticket in London I would pay in the currency of that country.

Dr. Thomka-Gazdik: That is correct. If I may add, although I do not have the statistics in front of me—I was not expecting this line of questioning—I made only a casual reference that international air transport is similar to exports. But a large sector of the traffic which Canadian carriers bring to Canada originates somewhere outside of Canada and does not necessarily originate in the countries with which Canada has a bilateral air transport agreement. It may originate much further.

One of the types of agreements which IATA has developed is an inter-airline agreement. You can sell a ticket in the remotest part of Latin America for transportation through Canada to Australia and pay it in the currency of that country in Latin America; and the Canadian carrier, carrying that particular passenger from Montreal to Vancouver, will get the fares in dollars through the IATA clearing house.

That sounds a very complicated and complex mechanism. It is a complex mechanism, but it has developed through the airline corporations through IATA.

Senator Laird: Mr. Chairman, what we need to decide is what is a foolproof method of doing what the witness is asking us to do, which makes sense.

The Chairman: Do you have a formula?

Dr. Thomka-Gasdik: Mr. Chairman, with the greatest temerity, and with the excuses I have to make that I am not a legislative draftsman, I will put before you a text which merely gives an expression of what would perhaps be the manner in which to achieve the objective I am seeking.

The Chairman: I have here an extract of the provision in this regard made in the United States. I also have a provision which it is suggested will provide the exemption in the case we are dealing with. It is fairly lengthy, but perhaps I should read it. First, the U.S. provision, which is:

> Sec. 412 [49 U.S. Code 1382].
>
> (a) Every air carrier shall file with the Board a true copy, or, if oral, a true and complete memorandum, of every contract or agreement (whether enforceable by provisions for liquidated damages, penalties, bonds, or otherwise) affecting air transportation and in force on the effective date of this section or hereafter entered into, or any modification or cancellation thereof, between such air carrier and any other air carrier, foreign air carrier, or other carrier for pooling or apportioning earnings, losses, traffic, service, or equipment, or relating to the establishment of transportation rates, fares, charges, or classifications, or for preserving and improving safety, economy, and efficiency of operation, or for controlling, regulating, preventing, or otherwise eliminating destructive, oppressive, or wasteful competition, or for regulating stops, schedules, and character of service, or for other cooperative working arrangements.

Subparagraph (b) of the U.S. provision states:

> (b) The Board shall by order disapprove any such contract or agreement, whether or not previously approved by it, that it finds to be adverse to the public interest, or in violation of this Act, and shall by order approve any such contract or agreement, or any modification or cancellation thereof, that it does not find to be adverse to the public interest, or in violation of this Act; except that the Board may not approve any contract or agreement between an air carrier not directly engaged in the operation of aircraft in air transportation and a common carrier subject to the Interstate Commerce Act, as amended, governing the compensation to be received by such common carrier for transportation services performed by it.

This is quite a lengthy provision. The International Air Transport Association is suggesting, through Dr. Thomka-Gazdik, that we insert as a new section 32(8) the following:

> (a) In a prosecution under subsection (1), a court shall not convict the accused if the conspiracy, combination, agreement or arrangement pertains to any contract or agreement affecting air transportation and relating to the pooling or apportioning of earnings, losses, traffic, service, or equipment, or relating to the establishment of transportation rates, fares, charges, or classifications, or for preserving and improving safety, economy, and efficiency of operation, or for controlling, regulating, preventing, or otherwise eliminating destructive, oppressive, or wasteful competition, or for regulating stops, schedules, and character of service, or for other cooperative working arrangements, including the collective selection and administration of agencies for the sale of air transportation; provided that such contract or agreement to which the accused is a party shall have been filed with the Canadian Transport Commission.
>
> (b) The Canadian Transport Commission may by order disapprove any contract or agreement affecting air transportation to or from Canada which unduly restricts competition or is otherwise prejudicial to the public interest.

Senator Connolly: By including (b) would we not be effectively amending the act dealing with the powers of the Canadian Transport Commission?

Mr. Cowling: It would give the CTC additional powers.

Senator Connolly: As a first reaction, I do not know whether we want to do that. If we are going to exempt air carriers from prosecution under the new act, that is one thing, but to give the CTC additional authority might require some further thought on the part of the committee.

The Chairman: In my view, that would be properly done by an amendment to the Aeronautics Act.

Senator Connolly: This would be another case of amending one act through amending another act, and that is sloppy.

The Chairman: That has been brought up from time to time, but we keep on doing it. Even Bill C-2 amends the provisions of the Bank Act. As a procedure, there is nothing unusual about it now.

Senator Connolly: I realize it has been done, but I am not sure that it is a good thing. In any event, it is not necessary in this case, is it?

The Chairman: Dr. Thomka-Gazdik, if we were to amend the bill so as to exempt air carriers, using only the language of subparagraph (a), which I have read, leaving aside subparagraph (b), which refers to the Canadian Transport Commission, you would still have protection against the provisions of Bill C-2, would you not?

Dr. Thomka-Gazdik: Yes, Mr. Chairman. The reason for inserting subparagraph (b) was to satisfy the Department of Consumer and Corporate Affairs. I understand there have been discussions between Canadian carriers and the Department of Consumer and Corporate Affairs, and it became evident that there is somewhat of a struggle between two large departments as to control. The Canadian Transport Commission, on the one hand, controls certain matters, and the Department of Consumer and Corporate Affairs controls other matters. What we are trying to avoid is having two regulatory agencies looking over their shoulder in respect of the same matter.

The Chairman: If subparagraph (a) is approved by the committee, it will exempt such services relating to agreements fixing international air rates. That is enough for your immediate purposes, is it not?

Dr. Thomka-Gazdik: It is, Mr. Chairman, and we would be very pleased to have that.

The Chairman: If the Canadian Transport Commission is to be given additional powers, I think that should be brought about by an amendment to the Aeronautics Act. We could make an amendment to the Aeronautics Act by amending this bill, but I would hesitate to do so.

Senator McIlraith: Mr. Chairman, subparagraph (b) deals with another matter entirely, that being the powers of the Canadian Transport Commission. We do not have evidence on that, nor is it covered by a reference to the committee. Surely it should not be dealt with by the committee. We should stick to what is properly before us.

The Chairman: That is right.

Mr. Cowling: The Canadian Transport Commission does in fact have a degree of control over the tariffs, which is the important thing.

The Chairman: The CTC could disallow the tariffs.

Senator McIlraith: Whether it is structured to receive the additional responsibilities proposed under subparagraph (b) is another matter.

The Chairman: I agree that there are many good reasons for not putting in this reference to the Canadian Transport Commission. In my opinion, we should just go as far as providing the exemption under subparagraph (a).

Who is the author of this proposed amendment?

Dr. Thomka-Gazdik: I am sitting beside you, Mr. Chairman.

The Chairman: Did you have anything to do with this, Mr. Cowling?

Mr. Cowling: No. I wish I had. I think it is an excellent job, although Dr. Thomka-Gazdik was very modest when he presented it a few moments ago.

The Chairman: The language that appears in section 412(a) of the U.S. act has, to a considerable extent, been borrowed for the proposed amendment. It certainly goes far anough in providing an exemption. It would provide a good defence to a prosecution under Part V of the act. The language is, ". . . a prosecution under subsection (1) . . . "—and that is subsection (1) of section 32 of the bill—

Senator Connolly: Is it not subsection (8) of section 32?

The Chairman: No; I am saying that Part V of Bill C-2 is the criminal part of the legislation and Combines Investigation Act. That starts with section 32, does it not?

Mr. Cowling: Yes, that is correct.

The Chairman: Section 32.1 is in general language, providing that anyone who conspires, agrees and so forth is guilty of an offence. It provides that in a prosecution under subsection (1), a court shall not convict the accused if the conspiracy, combination, agreement or arrangement pertains to any contract or agreement affecting air transportation and relating to these items, including the fixing of air rates. That seems to provide the type of exemption to which this service is entitled.

Senator Connolly: And it would allow governments to conspire and fix rates. I am not saying that seriously.

The Chairman: No, it is facetious.

Senator Walker: The only way the Canadian government could get along is in that manner. Were Lester Pearson here he would term it compromise.

Senator Laird: Would it bring matters to a head if I moved that paragraphs (a) and (b) be adopted?

The Chairman: Yes; the motion would be to add to Bill C-2 a section 32.(8).

Senator Laird: In the language which you have read.

The Chairman: In the language which I have read.

Senator Laird: Leaving out the second part.

The Chairman: Leaving out the second part, yes.

Senator Laird: I so move.

The Chairman: Is there any further discussion desired with respect to this point?

Hon. Senators: Carried.

The Chairman: Those in favour? Contrary, if any? Carried.

I would like to have the authority of the committee that possibly we should make an interim report to the Senate on this amendment.

Hon. Senators: Agreed.

The Chairman: It is an important amendment.

Senator Beaubien: Yes.

The Chairman: All that happens is that the amendment is tabled and I ask for leave to explain its meaning. There is no debate on it, unless someone makes a motion to call the attention of the Senate to such-and-such a matter which has been tabled.

Is it agreed now that this is the amendment?

Hon. Senators: Agreed.

The Chairman: Thank you, doctor.

Dr. Thomka-Gazdik: Thank you very much, Mr. Chairman, for your understanding.

Senator Connolly: It has been a very good presentation.

Senator Walker: We can see why you have the job.

The Chairman: My suggestion is that the committee now go into *camera* for a few minutes so that our legal advisor may relate some of his discussions with officials of the department in relation to our amendments.

The committee continued *in camera.*

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FIRST SESSION—THIRTIETH PARLIAMENT

1974-75

THE SENATE OF CANADA

PROCEEDINGS OF THE

STANDING SENATE COMMITTEE ON

BANKING, TRADE AND COMMERCE

The Honourable SALTER A. HAYDEN, *Chairman*

Issue No. 44

WEDNESDAY, JUNE 18, 1975

Complete Proceedings on Bill S-26, intituled:

"An Act respecting Alliance Security & Investigation, Ltd."

REPORT OF THE COMMITTEE

(Witnesses: See Minutes of Proceedings)

29389—1

THE STANDING SENATE COMMITTEE ONBANKING, TRADE AND COMMERCE

The Honourable Salter A. Hayden, *Chairman*

The Honourable Senators:

Barrow	Hayden
Beaubien	Hays
Buckwold	Laird
Connolly (*Ottawa West*)	Lang
Cook	Macdonald (*Cape Breton*)
Desruisseaux	Macnaughton
Everett	McIlraith
*Flynn	Molson
Gélinas	*Perrault
Haig	Sullivan
	Walker—(19)

**Ex officio* members

(Quorum 5)

Order of Reference

Extract from the Minutes of the Proceedings of the Senate, June 11, 1975.

"Pursuant to the Order of the Day, the Honourable Senator Flynn, P.C., moved, seconded by the Honourable Senator Grosart, that the Bill S-26, intituled: "An Act respecting Alliance Security & Investigation, Ltd.", be read the second time.

After debate, and—
The question being put on the motion, it was—
Resolved in the affirmative.

The Bill was then read the second time.

The Honourable Senator Flynn, P.C., moved, seconded by the Honourable Senator Grosart, that the Bill be referred to the Standing Senate Committee on Banking, Trade and Commerce.

The question being put on the motion, it was—
Resolved in the affirmative."

Robert Fortier,
Clerk of the Senate.

Minutes of Proceedings

Wednesday, June 18, 1975
(59)

Pursuant to adjournment and notice the Standing Senate Committee on Banking, Trade and Commerce met this day at 9:30 a.m.

Subject: Bill S-26—"An Act respecting Alliance Security & Investigation, Ltd."

Present: The Honourable Senators Hayden, (*Chairman*), Beaubien, Connolly (*Ottawa West*), Cook, Flynn, Haig, Laird, Macdonald (*Cape Breton*), Macnaughton, Molson, Sullivan and Walker. (12)

In Attendance: Mr. R. L. du Plessis, Legal Adviser to the Committee.

WITNESSES:

Alliance Security & Investigation, Ltd.:

Mr. Luc R. Forget, Counsel; and

Mr. Maurice Babeux, President.

Following discussion and upon motion duly put, it was *Resolved* to report the said Bill without amendment.

At 9:40 a.m. the Committee proceeded to the next order of business.

ATTEST:

Frank A. Jackson,
Clerk of the Committee.

Report of the Committee

Wednesday, June 18, 1975

The Standing Senate Committee on Banking, Trade and Commerce to which was referred Bill S-26, intituled: "An Act respecting Alliance Security & Investigation, Ltd.", has, in obedience to the Order of Reference of Wednesday, June 11, 1975, examined the said Bill and now reports the same without amendment.

Respectfully submitted,

Salter A. Hayden,
Chairman.

The Standing Senate Committee on Banking, Trade and Commerce

Evidence

Ottawa, Wednesday, June 18, 1975

The Standing Senate Committee on Banking, Trade and Commerce, to which was referred Bill S-26, respecting Alliance Security & Investigation Ltd., met this day at 9.30 a.m. to give consideration to the bill.

Senator Salter A. Hayden (*Chairman*) in the Chair.

The Chairman: Honourable senators, the first matter we have to consider this morning is Bill S-26. I take it, Senator Flynn, that as sponsor of the bill you have nothing further to add.

Senator Flynn: I have nothing further to add, Mr. Chairman, but Mr. Forget, counsel for the petitioner, may have.

The Chairman: Yes. We have with us Mr. Forget, counsel, and Mr. Babeux, president of the company. This is a simple but unusual bill. It is simply reviving the charter of company which, I understand, carried on during the period in which it was supposed to be dead, operating its business just as if it were a living entity. It would seem the appropriate time, and a fitting ceremony, to give the company proper recognition.

Mr. Forget, is there anything you would like to add?

Mr. L. R. Forget, Counsel, Alliance Security & Investigation Ltd.: I have nothing to add, Mr. Chairman. I am prepared to answer any questions, however, if there is anything you would like clarified.

The Chairman: This is really the preferred course you are taking in this bill. It will meet all your purposes?

Mr. Forget: Yes.

Senator Connolly: Mr. Chairman, with respect to this kind of application, is there not some way of accommodating the public so they are not put to the expense and time involved in following this form of application?

The Chairman: This is under the earlier act, the Canada Corporations Act.

Senator Connolly: I realize that. I just wondered if an amendment could be made to the Canada Corporations Act which would make it unnecessary for the public to come here like this.

The Chairman: The Canada Corporations Act was repealed by the Canada Business Corporations Act.

Senator Flynn: The idea is good, but it will be dealt with in the new legislation when it applies. It is provided in the new legislation.

The Chairman: Yes, it is in the Canada Business Corporations Act. But for reasons that I think are fairly obvious, this is a preferred course of action. Is there a motion to report the bill without amendment?

Hon. Senators: Agreed.

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FIRST SESSION—THIRTIETH PARLIAMENT
1974-75

THE SENATE OF CANADA

PROCEEDINGS OF THE

STANDING SENATE COMMITTEE ON

BANKING, TRADE AND COMMERCE

The Honourable SALTER A. HAYDEN, *Chairman*

Issue No. 45

WEDNESDAY, JUNE 18, 1975

Third Proceedings on:

"The *Subject-Matter* of Bill C-60, Bankruptcy Act, 1975"

(Witnesses: See Minutes of Proceedings)

29408—1

THE STANDING SENATE COMMITTEE ON BANKING, TRADE AND COMMERCE

The Honourable Salter A. Hayden, *Chairman*

The Honourable Senators,

Barrow	Hays
Beaubien	Laird
Buckwold	Lang
Connolly (*Ottawa West*)	Macdonald (*Cape Breton*)
Cook	Macnaughton
Desruisseaux	McIlraith
Everett	Molson
*Flynn	*Perrault
Gélinas	Sullivan
Haig	Walker—(19)
Hayden	

**Ex officio* members

(Quorum 5)

Order of Reference

Extract from the Minutes of the Proceedings of the Senate, May 13, 1975.

"The Honourable Senator Hayden moved, seconded by the Honourable Senator Bourget, P.C.:

That the Standing Senate Committee on Banking, Trade and Commerce be authorized to examine and report upon the subject-matter of the Bill C-60, intituled: "An Act respecting bankruptcy and insolvency", in advance of the said Bill coming before the Senate, or any matter relating thereto; and

That the Committee have power to engage the services of such counsel, staff and technical advisers as may be necessary for the purpose of the said examination.

After debate, and—
The question being put on the motion, it was—
Resolved in the affirmative."

Robert Fortier,
Clerk of the Senate.

Minutes of Proceedings

Wednesday, June 18, 1975
(60)

Pursuant to notice the Standing Senate Committee on Banking, Trade and Commerce met this day at 9:40 a.m.

SUBJECT: *Bill C-60—Bankruptcy Act, 1975.*

Present: The Honourable Senators Hayden (*Chairman*), Beaubien, Connolly (*Ottawa West*), Cook, Flynn, Haig, Laird, Macdonald (*Cape Breton*), Macnaughton, Molson, Sullivan and Walker. (12)

In Attendance: Mr. David E. Baird and Mr. Melvin C. Zwaig, Advisors to the Committee.

The Committee continued its examination of the above subject with the assistance of the advisory staff.

At 12:15 p.m. the Committee adjourned to the call of the Chairman.

ATTEST:

Frank A. Jackson,
Clerk of the Committee.

The Standing Senate Committee on Banking, Trade and Commerce

Evidence

Ottawa, Wednesday, June 18, 1975

The Standing Senate Committee on Banking, Trade and Commerce met this day at 10 a.m. to consider the subject matter of Bill C-60, respecting bankruptcy and insolvency.

Senator Salter A. Hayden (*Chairman*) in the Chair.

Senator Connolly: Mr. Chairman, before we resume our consideration of this matter, do you know if an attempt will be made to get the bankruptcy bill through the House of Commons and into this house before the summer recess?

The Chairman: I understand that it will stay in the position it is in at the moment. It was tabled in the house, and they do not propose to move it along until the fall. Part of the reason for that may be that they are waiting for us to do quite a lot of the work. What will happen in the fall will depend on whether we resume this session or start a new one.

Senator Connolly: In the light of the discussion we had last week, it seemed to me the committee would probably like to hear the comments of the Canadian Bar Association before the recess.

The Chairman: Senator Connolly, I can tell you that Mr. Mayer, who is the chairman of the section of the Canadian Bar Association which is to deal with the bankruptcy submission, was in touch with me last week. He was concerned about when he would have his submission in proper form to submit to this committee. He had been told, somewhere in rumour alley, that we were pushing ahead and expected to report this bill and that the house would move along, too, all before the summer recess. I told him the answer was no on that. He said he could not possibly have his submission ready and approved by the various groups in the CBA before the middle of August or so. I assured him, in my nicest manner—some people may quarrel with that description—that he could have all August, because I anticipated that parliament would not be sitting in August. I told him I thought our deadline would be not later than the middle of July or the first week of July.

What I would like to do before that—and I have been putting a little pressure on our experts—is to pick out three of four items which are glaring and make an interim report and let them have the summer to think about it over in the other place.

Senator Flynn: Mr. Chairman, I saw the program of the annual meeting of the Canadian Bar Association which is to take place in the last week of August, and I noticed that they had reserved a full session to study this legislation.

The Chairman: Yes, but I think they will not have their submission into us before the resumption of Parliament.

Senator Flynn: They will probably have a report prepared before then, if not for us then at least for the members of the bar generally.

The Chairman: Yes.

Senator Connolly: You made that comment rather badly, Senator Flynn. What you should have said was that the Canadian Bar Association meeting is to be held in Quebec City!

Senator Flynn: I thought everybody knew that.

Senator Laird: Mr. Chairman, in terms of the time element, perhaps I should mention that next Tuesday is St.-Jean-Baptiste Day and the Tuesday after that is July 1. It is conceivable that the Senate will not sit on either or both of those days.

The Chairman: We will face that when we come to it. It might be that the Senate will not wish to sit on either of those holidays. We did run into a strange situation, if you will recall, when we were studying the income tax bill; we sat on St.-Jean-Baptiste Day, and there was some discussion about it because then the Government Leader was very upset, but it turned out that the rule about Parliament not sitting was one that applied in the House of Commons but not in the Senate. So if we decided it was necessary to sit on any one of those days, I think we would have to select St.-Jean-Baptiste Day rather than July 1, but the committee can make a choice.

Senator Flynn: In any event, Wednesday is our committee day. The only difference, of course, is that the Senate will not be sitting on Tuesday night.

Senator Molson: Some of our members might want to be in the parade!

Senator Flynn: Nobody looks like a lamb here.

The Chairman: We are keeping you well furnished with material. Some more was distributed this morning. There is one item that you will find very interesting when we get to it. Mr. Biard is going to deal with it. He had one item left over from last day, and that was dealing with the obligations and responsibilities of directors which, when you contemplate what they suggest, is very horrible. You have that in your material that was carried over from last day, but the material that was distributed this morning is such that you will find it very interesting. It assumes that the bill has passed and become law in the form in which it is written. You see where most of the responsibility for administration is centred, and then on the right-hand side, in line after line and page after page, you will see "administration" and "administrator". This is just to give you a bird's-eye view of the extent to which the administrative end of it has been emphasized. I was going to say "overemphasized," but we have not decided that yet.

Now, Mr. Baird, you have one item you want to start with today regarding directors' positions. Then Mr. Zwaig has his series of items, and his statement is contained in this booklet that was distributed. So, would you care to start, Mr. Baird?

Mr. David Baird, Adviser to the Committee: Thank you, Mr. Chairman.

Bill C-60 makes many changes with respect to the obligations imposed on an officer or director of a bankrupt corporation. It creates a new category called an agent, a term that we have never used before. But the definition of "agent" is very extensive and it includes a director or an officer of a corporation, or persons performing the functions of an officer even though not formally appointed to the position of officer. An officer is defined under clause 2 as meaning the president, vice-president, secretary, assistant-secretary, treasurer, assistant-treasurer, comptroller, general manager, managing director or any other individual who performs similar functions . . . So it is an extremely broad definition of "officer," and "agent" is deemed to mean officer or director. So whenever we come across the term "agent" we must realize that it not only includes the persons actually designated as officers and directors of the corporation, but it even goes further to include those people who perform the functions of an officer.

Senator Molson: Are "officer" and "director" coupled? Do you mean an officer and/or a director, or do you mean a person who is appointed an officer of a company who is a director?

Mr. Baird: No, it is director and/or officer.

Senator Macnaughton: Has anybody been left out?

The Chairman: Unless you can define new titles and new duties, it would appear that they have covered the whole range of the working officers of the company.

Mr. Baird: They have used the term "agent", which in a broad definition would mean a director and/or an officer, and an agent can now be made liable for any deficiencies in the bankrupt estate. This means that if a company goes bankrupt it is possible for a court to order that an officer and/or a director be responsible to pay to the trustee in bankruptcy the difference between the assets and the liabilities under certain circumstances. This is an attempt to sever the normal concept of a corporate veil, which is to give the directors protection from the liabilities of a corporation. This changes that concept and makes the director personally liable for the deficiencies between the assets and the liabilities of a corporation. This does not happen in every case where a company goes bankrupt; it happens where a court finds that the agent has acted in a certain manner. It does not go so far as to require fraud, but the terminology is very vague. Section 176(1) of the new act imposes the new liability on the agent, and I think the best I can do is to read it to you because then you will realize from the language the scope of its application.

> 176.(1) Subject to section 178, an agent or former agent is liable for any deficiency in the estate of a person for whom he acts as agent where that person becomes a bankrupt and the agent or former agent, . . .

which basically means the corporation.

> . caused the person when the person was insolvent or unable to pay his debts
>
> (a) to carry on business in a manner that was not in the interests of the person;

The Chairman: What person?

Mr. Baird: In this case "person" means the bankrupt. He can also be made responsible for the liability if the agent caused the bankrupt to enter into a transaction that at the time of the transaction could not reasonably be considered to be in the interests of the person. Section 178 is a limiting section it provides that th liability imposed on the agent is reduced to the actual damage caused to the estate.

Senator Beaubien: The estate is not the creditors?

Mr. Baird: Basically it is the creditors. The bankrupt estate now represents the creditors and any obligation is paid to the bankrupt estate for distribution among the creditors.

Senator Flynn: It has to be related to damages, in other words?

Mr. Baird: Yes, the liability is reduced to the amount of the loss or damage caused to the estate.

The Chairman: If the directors are sued for mishandling the estate, whatever the damages, that would be the measure of the responsibility of the directors.

Senator Flynn: This appears to be a general rule, and then you would come to the problem of dividends and the problem of wages.

Senator Connolly: This is really not much of a departure from the present law. It really means that officers and directors and agents of corporations are to be held responsible for misfeasance. Doesn't that apply today?

Mr. Baird: They are responsible for fraud today and they are responsible for negligence. If they are negligent they could be held responsible to a corporation. But I think this goes further than that. What they are calling into judgment, with hindsight, are their business decisions—carrying on business in a situation where there is an attempt to hold the company out of bankruptcy, but in fact where there is an additional loss suffered, a director or officer could be responsible for that loss. It appears to put into judgment the business decisions that are made. Whether or not they are made completely honestly, with intent to help the company not to produce any personal benefit for the officer or director, he could still be held to be liable for the damage. Now, they have used the term "reasonably", and that is a saving feature in it. What is "reasonable" in the circumstances?

Senator Connolly: It puts the onus on the agent.

Mr. Baird: It puts the onus on the agent of proving it was reasonable. That is correct.

The Chairman: Mr. Baird, I was wondering. Is there any circumstance, under this bill, where a company becomes bankrupt and there is a deficiency in the assets, when the directors could escape liability? I am not talking about the quantum of liability, but escaping an action against them by the administrator or trustee for some amount of money.

Mr. Baird: It is very difficult to determine precisely when a company becomes insolvent. This is a very difficult point. You say "at some point". In almost every company there is a shorter or longer period of time when

a company carries on business after it is insolvent. It becomes a question of judgment as to when the company becomes insolvent, and I think what you are saying, Mr. Chairman, is that in every company that goes bankrupt there could be a period of time when business is carried on at a time when the company is insolvent.

The Chairman: It would be a very rare situation where the company would become bankrupt over night. There must be an eroding—at least, that is the ordinary way in which it happens—of the assets, and you have the directors trying to preserve the position and restore the financial condition of the company. Now, in doing that, they may be working against their own best interest.

Mr. Baird: The problem is, the time it becomes insolvent, and whether at that point in time they are using creditors' assets to maintain the business, as opposed to any personnal as sets, such as any equity in their own shares.

Senator Cook: Does the administrator not have to prove two things: one, that the company was insolvent; and two, that he was carrying on in his own interest, or the interest of someone related to him?

Mr. Baird: He does have to show that it is in the interest of the agent. He also has to show it is not in the interests of the bankrupt.

Senator Cook: "—where that person becomes a bankrupt and the agent of former agent, in his own interest or the interest of someone related to him . . ." In other words, there is some impropriety on the part of the agent. Clause 176.

The Chairman: Senator Cook, I can see a situation where the directors are faced with a certain condition in the company, and they have to decide if it is in the best interest of the company that they should take steps to try to work out the problems, or whether they should stop then.

Senator Cook: Yes, but this is norrowed. "In his own interest," not, "in the interest of the company".

Mr. Baird: Senator, your interpretation is that one of the key elements of proof, in order to establish the agent's liability, is that any act he does must be in his own interest.

Senator Cook: Yes, or someone related to him. In other words, a personal judgment, or a personal impropriety.

The Chairman: Yes, but following the statement I was making, it seems to me that whichever way the directors move, under clause 176, if bankruptcy is the end result, they are going to be liable. One can say of them, "Well, the decision you made to carry on in the best interest of the company, in the circumstances, was the wrong decision." Or one could say of them that making a decision not to carry on was not in the best interest of the company. Is that a fair statement?

Mr. Baird: Yes. The qualification to that is, is that in his own interest? Now, what is in his own interest? This is a very difficult determination to make, because if this man is a shareholder, carrying on the business, in any event, would be in the interest of a shareholder, because if the company is bankrupt there is nothing for shareholders. If the company is successful, however, there could be a benefit achieved for a shareholder.

Senator Cook: Do you not think this brings in a question of conflict of interest? In other words, you have to establish that when the company was insolvent he was carrying it on in his own interest, possibly, as distinct from the interest of the estate, or the shareholders, or the creditors, or something.

Mr. Baird: If it was limited to a situation where they had to prove it was done to give a personal benefit to an officer or director, as opposed to enhancing the value of his shares, that would be a reasonable limitation.

I think the section could be interpreted more broadly than that narrow approach that I have presented. What is meant by "in his own interest"? There are many things that could be in his own interest. There is personal reputation, for example. That is not a monetary factor. There could be the enhancement of the value of his shares. Each of those could be in his own interest. If the section were limited to where there was a personal monetary benefit achieved by the officer or director, as a result of carrying on business, then maybe the section is in order.

The Chairman: Maybe that is a notation we should make, that you should more closely define "interest", and limit it to a monetary interest.

Senator Molson: What about the defence of due diligence?

The Chairman: What do you have to say about that, Mr. Baird?

Mr. Baird: They have used the term "reasonable" in some of the clauses. They have not used the term "reasonable" in all of them, and I do not know why this term was deleted in some of the clauses such as subclause (a).

Senator Walker: They probably do not know either.

Senator Macnaughton: Mr. Chairman, who renders the decision?

The Chairman: I think it is a good suggestion to toss around, that is, that some variation of the defence of due diligence may properly come in to limit the responsibility of directors.

Senator Molson: Perhaps I am wrong, and perhaps I do not understand it fully, but it seems to me that you have a completely different situation where you have a sole proprietor, or a partnership, and where on the other hand you have a larger corporation. It seems to me that these agents who are described here could be acting in the same way with quite different objectives, depending on the background circumstances. They could be completely different. If it is a sole proprietorship, or a partnership, or something like this, if the sole proprietor is doing anything that is against the creditors, it is in his own interest, no doubt.

The Chairman: And if he is hurting the partnership, or the company, he is hurting himself, if he is the sole proprietor.

Senator Molson: If he is a director, with qualifying shares in General Motors, or something like this, whatever he does there, the personal benefits are liable to be pretty hard to define or to raise.

Senator Macnaughton: Who decides whether he is guilty or not guilty?

Mr. Baird: It is the court who decides.

Senator Macnaughton: Not the administrator?

Mr. Baird: No.

Mr. M. C. Zwaig, C.A., Adviser to the Committee: I understand, Senator Macnaughton, that it is based on the inquiry and the results of the inquiry conducted by the administrator under Sections 199 and 200.

Senator Connolly: Mr. Chairman, I think we should remind ourselves of this, that clause 176 of the bill uses the words:

> —where that person becomes a bankrupt and the agent or former agent, in his own interest or the interest of someone related to him—

Those words are in the preamble. Presumably they colour all the sub-items from (a) down to (f).

The Chairman: That is right.

Senator Connolly: Which brings me back to Senator Cook's point, that it must be shown that there was a personal advantage to the man in every action he took. I suppose, really, what we are talking about is whether or not, when a company is in difficult circumstances, the directors should try to take hold and rehabilitate it, and in so doing make themselves liable for any shortfall in the action they take.

Mr. Zwaig: I think, Senator Connolly, you have made the point dead on. This may discourage directors or officers from getting involved with a sick company because if you look at section 176(1)(e) one of the points is to continue the business by resorting to sales below cost. That may mean to run off old inventory. But the next point is ruinous borrowings or similar acts. How do we define "ruinous borrowings." Does it mean that if you get a second mortgage in order to introduce additional capital into a company, of if you substitute a second place higher cost financing to replace a bank that has called its loan? These are points which may render the agent liable when he is really trying to remedy a sick situation.

Senator Cook: If you challenge him on that, you have to establish it was not reasonable to expect that the bankruptcy could be prevented. In other words the onus is on the person challenging to show that it was not possible or reasonable to prevent the bankruptcy.

Mr. Zwaig: You may be leaving too much to chance there, because a large portion of this problem to the director or officer may arise as a result of the inquiry conducted by the administrator under sections 199 and 200. It is on the basis of that report that someone is eventually going to decide as to whether the director or officer is liable.

Senator Connolly: This is on the other side of the coin. I suppose one of the things we are trying to perceive here is a case where you have a relatively small company and a manager or creditor trying to perpetuate a continuation of his earnings and he resorts to questionable borrowings, fire sales, to keep the company going and maintain his income over a period.

The Chairman: If you need to become liquid and the only way to do it is to move out your inventory at whatever price you can get and the company needs money, there is a judgment decision. Do I have what you might call a fire sale, or no sale and just sit with the inventory, if there is a market for it at some price? It may be a fire sale price, but there is no other market. If I go ahead and do that, and the company ultimately becomes bankrupt, the directors who made the decision quite likely would be subject to section 176.

Mr. Zwaig: The problem of hindsight, of having someone come along later and say you made the wrong decision—it was not reasonable in those circumstances for you to have made this sale—it is easy to make it on hindsight because we know everything went wrong, the company eventually went bankrupt, but it is very difficult for a person to go back and put himself in the place of the director and know all the factors influencing the director at the time he made that decision.

Senator Connolly: Could we not ensure that then by making the change that Senator Molson suggested a few moments ago, in other words, provide the agent with a defence of reasonable conduct in this section?

Senator Flynn: That may mean redrafting it entirely.

The Chairman: There may be a redrafting necessary.

Senator Flynn: You may have some cases where it is quite clear, as in paragraph (f) which speaks about impeding, defrauding, obstructing, delaying creditors generally. You do not have to say that he would have to do that in his own interests or in the interests of someone related to him. That would be a definite fault which obviously, without being mentioned in the act, would create liability of the director or other person doing it.

The test, of course, is in some of the cases whether it is in his own interest or in the interest of one related to him. Any agent, director or shareholder has an interest, it seems to me, in going on and delaying the bankruptcy. If you are in receipt of a salary as an officer you lose your job. You are trying to keep your job and it is in your interest that you are doing all these things. But they may be very proper otherwise. If they are improper, I agree. I think the test would be the fault, a fair fault.

The Chairman: To avoid that, it would mean that a director, agent or officer, during a period when he is applying his best judgment but still ends up in bankruptcy, should take no remuneration.

Senator Cook: If you do not have a section such as this, you have no check on a man. In other words you can go on paying salary for six months and doing nothing else, and when he does nothing else you are not called upon to explain. In this section you are called upon to give an explanation why you so acted.

Senator Laird: In other words, he can mulct the company. That is what you mean.

Mr. Zwaig: It is a question whether a section like this is necessary. However, maybe there should be a time limit for which period directors and officers would be liable also, as well as to differentiate the directors and officers of, let us say, large public corporations from the directors and officers who are really sole proprietors and partners and operating under the corporate veil. If you can incorporate amendments along those lines, I think it probably would be acceptable to all.

The Chairman: What about the position of a director who is described as president and chief executive officer of the company? Does this section 176 limit the liability in

such a case to the person who is the president and chief executive officer, being the one who is in the direction and control? Or, if you are a director do you have to take some positive steps to be stuck in under section 176, or does the mere fact that you are a director and that you have a bankruptcy as a result mean that you are liable under section 176?

Mr. Baird: The word used is "caused"—that the agent caused the bankrupt to do this act. It is extremely difficult to say who caused the bankrupt to do so. If it is a resolution of the board of directors, I suppose it is the board of directors who caused the bankrupt to do so. The chief executive officer, Mr. Chairman, could cause the bankrupt to do something.

The Chairman: Yes. He could recommend to the board.

Senator Laird: Isn't a big weakness the very thing that Senator Connolly pointed out, that with this potential facing anybody, why struggle to keep the company going and revive it? Have we not all had the experience—at least, I have had it—of seeing companies teetering like that and then the directors pitching in and taking extraordinary steps to keep the company alive and eventually ending up with a company that is prosperous? But this is discouraging.

Mr. Zwaig: They may be trying to encourage a company which is tottering the way you are suggesting, going to a commercial arrangement and having its assets and liabilities determined as of a specific date. This may have been in the draftsman's mind—rather than prolonging the agony and eventually going into bankruptcy. I think that this area will be presented in a number of briefs before this committee and certainly may result in some type of amendment.

Senator Walker: Excuse me for trying to bring this to a head. Have you any suggestion yourself as to what clause could be put in to solve this problem?

Mr. Baird: I would like to be more specific about the words "in his own interest." If we are talking solely about increasing the value of his shares, then every director would be always acting in his own interests and would be caught by the wording of this section. If "in his own interest" means receiving a salary, the continued receipt of salary, that could be interpreted as being in his own interest.

Senator Cook: Surely in addition to what you have there, you have to prove that he acted unreasonably. Otherwise, if he acted reasonably, if he is going to have a fire sale, he sits down and says why he is going to have it, what he is going to do with the proceeds, and he would get the opinion of the auditors and of the solicitor. Surely that is reasonable?

The Chairman: Senator Cook, why could you not limit "in his own interest" by providing that "in his own interest" means an interest that is enjoyed by him and not by any of the other officers or directors of the company? That is one interpretation which could be made.

Mr. Baird: It would be limited to a case where he received a special benefit over and above other officers, directors or shareholders of the company.

Senator Cook: Or his interest is adverse to that of the general estate.

Mr. Baird: That would be a good protection for a director. Also, it would be the test of acting reasonably. The concern is that you might think you are acting reasonably in the circumstances and the court would come along later and find that you were not. It leaves the director in that problem of uncertainty.

Senator Laird: Especially if influenced by the administrator's report.

The Chairman: Senator Flynn, I wonder how this strikes you. Supposing in these circumstances detailed in clause 176 a director or a group of directors went outside the company and consulted some business management firm or something of that kind, and got a recommendation approving proceeding in this fashion. If the company ultimately becomes bankrupt, would they not have an escape hatch there?

Mr. Baird: Definitely.

The Chairman: The moral in this, then, is that either you seek outside advice right away or you go to the administrator and dump the thing on his shoulders and propose an arrangement and seek to come under the commercial heading where he will determine which course you may take. But that means you are in bankruptcy.

Mr. Baird: In most cases this all happens before you go through any formal procedure. These are business decisions that are being made in order to keep a company going. We want to give the directors flexibility to make these business decisions honestly and in the best interests of their company and not have them under the cloud of thinking the court will come along later saying they made the wrong decision. We are also trying to prevent a fraudulent director from keeping the company alive in order either to pay him a higher salary or get some other personal benefit which he would not have if the company closed down.

The Chairman: Some special benefit.

Mr. Baird: Yes.

Senator Flynn: If the rule of the nullity of payments made three months before the bankruptcy were extended to six months, for example, and made specifically applicable to payments of salaries made to agents, officers and directors, I think that would certainly be a good remedy and there would only be a need to have a clause for the liability for real fraud.

Mr. Baird: If the only penalty which could be imposed was the penalty of requiring repayment of salary—

Senator Flynn: That would be something, because you would do away with the immediate interests of the agent.

Mr. Baird: Oh, yes.

Senator Flynn: Because there is no other interest than the dividend or the salaries or the saving of the shares by a shareholder.

Mr. Baird: And if the director then said, "I won't take a salary and I will still try to keep the company going," he would realize he would be under no penalty.

Senator Flynn: Even if he has to reimburse the salary once the bankruptcy takes place.

Mr. Baird: That is not an extremely serious penalty.

Senator Flynn: It could be. What is the other interest that a director or agent has at the time the business starts to go wrong? Is it to save his job and what he is receiving for it?

The Chairman: My own feeling in relation to clause 176 is that the application of it should be quite limited and specific. It should only be in the area of special interests. If he is otherwise liable, it should only be, well, maybe to repay his remuneration.

Senator Flynn: That is why I would get away from this concept of interest.

The Chairman: But exclude damages.

Senator Flynn: But keeping the notion of fault and describe the nature of fault which would create the liability for damages.

Mr. Baird: This would make the job of the court in assessing any penalty much easier, because you would have a fixed amount to be repaid.

Senator Flynn: You would achieve the same objective.

Mr. Zwaig: You would have a much easier job of proving your case before the court, and if you limit it as well to a time period you could zero in on the period when the company was at fault.

Senator Flynn: Take, for instance, the liability to repay a dividend paid one year before the bankruptcy. I do not know whether it is qualified, because some bankruptcies may occur because of a sudden situation which was not foreseen at the time the dividend was declared. But let us say that you have no exculpatory factor there, why not provide that the dividend is void, that the shareholders have to reimburse it, and that the directors may be liable for the deficiency in collecting the amount?

The Chairman: But then, Senator Flynn, you have this situation. You mentioned dividends. Directors can pay dividends out of current earnings or they can pay them out of the accumulated surplus. If there are no current earnings, in order to maintain a level of earnings to make the shares investments for all kinds of companies, they might declare a dividend payable out of the accumulated surplus. Maybe the company needed those surplus moneys.

Senator Flynn: For liquidity.

The Chairman: For working capital. But have the directors then contributed to the ultimate bankruptcy of the company by shortening its cash position by paying a dividend out of accumulated surplus?

Mr. Zwaig: Senator Flynn, there is a section in the Quebec Corporations Act which renders the directors liable if they declare and pay a dividend when the company is insolvent for the total of the dividend as well as for the total liability of the company.

Senator Flynn: If you declare a dividend out of the capital of the company. If you have a surplus it may be a problem of liquidity. It may be a problem of judging on the part of the directors to pay a dividend when you need the cash to continue the operations, but normally it is not illegal under any circumstances to pay a dividend out of a surplus.

Mr. Baird: There is a provision in the present Bankruptcy Act which makes a director personally liable if a dividend is paid when a company is insolvent or one which renders a company insolvent. Although this new proposed bill has changed the wording, it is very similar because, although in clause 156 it provides that, if a dividend is paid or shares redeemed within a year, judgment may be given against the directors jointly and severally for the amount of the dividend paid, there is a saving clause in clause 165 which says that there is no obligation to repay the dividend if it is proved at the time, or at any time after the dividend is paid, that the company which paid the dividend was solvent. So the only penalty is for repayment of the dividend in the situation where the company was insolvent at the time of payment—

Senator Macnaughton: Mr. Chairman, it seems to me that under this clause the only way to protect yourself as a director or an officer is to hire lawyers, accountants and management counsel, thereby increasing the debts of the company and thereby shoving it further in. But you have to protect yourself.

The Chairman: Senator Macnaughton, I thought you were going to say the only way to protect yourself as director is not to accept a directorship.

Senator Flynn: Would you be able to secure insurance like they provide now under the liability of directors under the present Canada Corporations Act? You are going very far now, but directors will have to get some insurance to protect themselves against their liability.

The Chairman: And he will have to pay the premiums himself.

Senator Flynn: But he will have to pay more in fees.

Senator Cook: Perhaps, Mr. Chairman, as you have said, we have shaken this sufficiently and perhaps we should go on to something else.

Senator Walker: Unless Mr. Baird has a solution or a wording for the clause.

Mr. Baird: I have not drafted a clause.

The Chairman: We have some idea of the general intent, and I should tell you that we are ticking these things to make them part of the substance of an interim report as early as we can make one. But we would like to pick a few instances that are really so outstanding in their nature that they have attracted your attention here. We do not want to just choose a simple correction of cross-references or things like that. We want to hit it where it hurts.

Senator Walker: Otherwise you would be ticking off the whole draft.

Senator Laird: Perhaps that would be the best solution.

Mr. Baird: There is another provision in section 177 which I think is valid, and that is if the agent fails to keep accounts in a manner that permits the trustee to distinguish the property of the agent from the property of the person for whom he acts or acted as agent and that person subsequently becomes bankrupt, the agent is liable for the deficiency. This is, I think, a very important concept of keeping accounts. One of the easiest ways for a person to defraud is by not keeping proper books and records, because then a person coming in afterwards to investigate the affairs cannot find out what has happened. I am a

great advocate of heavy penalties for failing to keep proper books and records. I am completely in favour of any penalty imposed for that failure.

Senator Flynn: Does that not exist presently?

Mr. Baird: This type of clause does not exist.

Senator Flynn: But if you are a trustee and you mix the estate of the trust with your own, then your own will be liable, it seems to me, under the present legislation.

The Chairman: Well, Mr. Baird, in Ontario lawyers are required to keep clients' money in a trust account, but if they have a trust account they put clients' money in, any interest that that account earns has to be paid over to the Law Society. But if you set up a separate trust account into which you put just one client's money, then you can retain the interest from that.

Mr. Baird: No, you have to pay it to the client. There is the general rule that if you intermingle personal assets with trust property, the trust property is expected to stay there. There is an artificial rule that the trust property stays and your assets are considered to be first removed from that pot in the sense that if there is not sufficient in the fund to pay both your personal obligations and your trust obligations, then your trust obligations will be paid first.

Senator Connolly: But that is the law now. So that at the present time the intermingling of assets, trust assets and personal assets is forbidden.

Mr. Baird: This clause goes further than that, and makes him liable for the deficiency in the estate and this is a heavier penalty subject to the ameliorating effect of clause 178 reducing the penalty to the actual damages caused.

Senator Connolly: It goes beyond the responsibility of the personal assets?

Senator Flynn: I don't see that. The trustee may recover the amount of the deficiency. But if you say the trust has a priority over the personal assets of the agent, that is the same thing.

Mr. Zwaig: If you look at section 177 you will see a reference in the middle of the section to section 178 and following that you see the words "is liable for the deficiency in the estate".

Senator Connolly: It is not limited to personal assets. It is extending it to the full personal liability on the part of the person concerned.

Senator Flynn: What more do you want than the assets of the agent?

Mr. Baird: You will never get more.

The Chairman: But then the point is that the agent is administering the assets which he has mingled with his own and with others.

Senator Flynn: And he would be bankrupt if he does not have enough to make up the deficiency.

Mr. Baird: You might be limiting it to the actual personal losses by section 178. So I think you create the entire liability for deficiency in section 177 and take some of it away in section 178. So we might accomplish what the law is at the present time by making him personally liable for the amount of his personal assets that are intermingled.

Senator Connolly: So what you are saying in effect is that it is a criminal act to mix these two, and if a person does that, if a person has assets, then those assets will answer, no matter where they are.

Mr. Baird: Yes.

Senator Cook: If the defence given in section 176(3)—in other words if he can prove that the company was solvent at the time he caused the action—is a good defence why can't that be available under section 175? As I read that Clause, a director is liable for two full years and up to $2,000 for any wages, and if you have a case where a company is completely solvent and is doing very well and a director retires, or if he dies and leaves an estate, and if some time afterwards the company goes insolvent, that director's estate is liable for anything up to $2,000 for wages for employees although the company at the time was solvent. So why cannot the defence in section 173 (3) be available in section 175?

Mr. Baird: But he is only liable for wages unpaid at the time that he was a director. That might be his protection. If the company were solvent and paying its debts at the time that he retired, then he would have no liability. But he can be sued within the period of two years for any debts that were unpaid at the time he resigned as director. I don't think that is unfair.

Senator Beaubien: But if he died is he deemed to have resigned?

Mr. Baird: Yes.

The next provision is the one we discussed briefly last day, and that is that the administrator has the power to apply to the court for an order deeming an agent to have the status of a bankrupt, and the provisions giving the agent that right are set out in section 207:

> 207. The administrator may, not more than one year after a person becomes a bankrupt, apply to the court for an order declaring that an agent or former agent of the bankrupt is, for the purposes of sections 210 to 217 and section 359, deemed to be a bankrupt. Basically what this means is that if an agent of the corporation is guilty of improper behaviour of a nature defined in section 200, the administrator has the right to apply to the court for such an order.

Senator Laird: And the heading of that particular portion of the bill is "Inquiries by the Administrator," so I suppose the whole process would be based upon his report. This I do not like.

Mr. Baird: That is correct. And he is the only person who can bring such an application. The creditors are given no right to bring such an application. The trustee in bankruptcy is given no right to bring the application.

Mr. Zwaig: There does not seem to be a provision for input by third parties.

Senator Laird: No.

Mr. Baird: Clause 209 is the clause that gives the court the power to make the order. Clause 209 is at page 105, and it provides:

> —the court shall make such an order if it is satisfied that
>
> (a) the agent or former agent, alone or jointly with another person,

(i) was primarily responsible for the bankruptcy of the bankrupt, or

(ii) substantially aggravated the insolvency or inability to pay of the bankrupt; or

(b) any of the circumstances set out in section 200— are proven.

Now, with regard to saying that a person is primarily responsible for the bankruptcy, surely the chief executive officer in every situation is primarily responsible for the bankruptcy. Who else can be responsible? Bankruptcy does not just occur in limbo. Someone has caused the company to go bankrupt, has made the business decision with respect to the company that was unfortunately incorrect—

The Chairman: Except, Mr. Baird, you may have the situation where, say, the vice-president or some other officer or director of a corporation has propounded a scheme which ultimately leads to the bankruptcy of the corporation, and he was so clever about it that the chief executive officer was not in on it and could not be connected with it.

Senator Connolly: Taking the assets out the back door.

The Chairman: Yes. Then, surely, under the bill the other directors, who could show they had nothing to do with it, could not be subject to the liabilities that we have been talking about.

Mr. Baird: Yes. That is correct, if there was a dishonest act, but I think a bankruptcy cann be caused by honest acts, honest business mistakes, and an honest mistake would make the director responsible. The term "or" is used here. I read the clause as being sufficient to make him liable if he has caused, or was primarily responsible for, the bankruptcy. I do not think that must necessarily have any improper or criminal connotation.

The Chairman: No, but I was just wondering about clause 216, which says:

> Where a person who is a director of a corporation becomes a bankrupt, he shall forthwith resign from the board of directors of the corporation.

Well now, under the Corporations Act you are not eligible to be a director if you are a bankrupt, or if you become a bankrupt. You cease to be a director.

Senator Walker: Just automatically.

Mr. Baird: That would be a statutory disqualification.

The Chairman: That is right.

Senator Connolly: Senator Hayden is saying here that there is a positive action required on the part of the director who becomes bankrupt. Senator Walker says that it should be statutory and automatic.

Senator Walker: Probably the draftees of this did not know that.

The Chairman: Well, it is statutory. That is my recollection. Under the Corporations Act, if a director is a bankrupt, one, he is not eligible to be elected a director, and two, if he becomes bankrupt, he ceases to be a director. That is making it automatic. Here it says he must resign.

Senator Flynn: Perhaps instead of saying that he shall be forced to resign we should say that he shall be deemed to have resigned.

The Chairman: I think what we should do, if anything, is just make a reference to the Canada Business Corporations Act.

Mr. Baird: It is applicable to the provincial acts as well, but I think you are correct. It may be desirable that he be automatically disqualified as a director.

Senator Flynn: How long does it last? Because he can get his discharge in 90 days.

Mr. Baird: Ninety days, unless there is a caveat filed, in which case it is five years.

Senator Flynn: I was just reading clause 215. It says:

> Where a person under the laws of another country has or had a status comparable to that of a bankrupt under the bankruptcy or insolvency laws of that other country and less than five years has elapsed from the commencement of that status, such person is subject to section 210, 211, 212 and 359 but is not entitled to obtain a certificate pursuant to section 205.

I was wondering whether you would apply that rule.

Mr. Zwaig: I understand that the deemed bankrupt does not fall in thhe 90-day category. I understand he is deemed bankrupt for a period of five years.

Senator Flynn: That would be reasonable.

Mr. Zwaig: In my understanding, the idea is not only to keep the fraudulent directors out of the business community, or attempt to, but keep the incompetents out as well.

I would like to see clause 209 leave out "primarily responsible for the bankruptcy of the bankrupt," and leave us the condition, "substantially aggravated the insolvency," because any officer, really, could be primarily responsible, if he is the chief executive officer of the company, particularly a small family size company.

Senator Cook: What about a definition of the discharge of a bankrupt? What is puzzling me for a moment is that it says on page 2:

> "bankrupt" means a person in respect of whom a bankruptcy order has been made or the legal status of such a person,

Then it says in clause 217:

> No person who is a bankrupt shall be elected or appointed a director or an officer of a corporation.

Does that still apply, even though he gets discharged?

Mr. Baird: No. I have always interpreted the word "bankrupt" as being a person who has the status of a bankrupt.

Senator Cook: Should we not say, "no person who is an undischarged bankrupt shall be elected or appointed a director or an officer of a corporation"?

Senator Flynn: No. If he is discharged he is not a bankrupt any more.

Mr. Baird: That is the question. Does the word "bankrupt" carry on forever, or does it automatically cease with his discharge?

Senator Cook: I cannot find a definition of a discharged bankrupt.

Mr. Zwaig:

> "bankrupt" means a person in respect of whom a bankruptcy order has been made or the legal status of such a person;

I would think that once the bankrupt obtains his certificate of non-responsibility he is no longer a bankrupt.

Senator Cook: Where does it say so?—"has been made".

Mr. Baird: And it could carry on forever, you mean.

Senator Cook: Yes.

Mr. Baird: We have to change that, yes. Look at the definition of "bankrupt" in clause 2. It has the word "or" there. I think the word "and" should be there, instead. In my view, the clause should read:

> "Bankrupt" means a person in respect of whom a bankruptcy order has been made and who has the legal status of such a person.

Senator Cook: You might even want to define a discharged bankrupt. Something has to be done, I think. It is sloppy, anyhow.

Senator Connolly: Is there anything in here which defines the status of a discharged bankrupt, or the effect of an order of discharge? It is not in the definition section.

Mr. Baird: They have not used the term "order of discharge". They have used the term "certificate of non-responsibility", and that is what we now think of as being an order of discharge. It is a certificate issued by the administrator.

Senator Laird: You mean they are changing the terminology?

Mr. Baird: Yes.

Senator Laird: For heavens' sake, why?

The Chairman: Well, to be different.

Senator Connolly: If a lot of the definitions go out the window, a lot of the jurisprudence goes out the window too.

Senator Walker: Presumably the authors will also.

Senator Connolly: No, but is it not a defect, Mr. Chairman, that the bill has nothing to indicate the effect of discharge?

Senator Cook: Or what used to be a discharge in the old days. Now it is a certificate of something or other.

Mr. Baird: The existing concept of "discharge" means a discharge of debt, so if a person goes bankrupt, his debts are not discharged until he gets his order of discharge. The new bill has a different concept. It provides for an automatic release of liabilities at the date he goes bankrupt, as opposed to getting the debts released as of the date of his discharge.

Senator Connolly: What do you mean by "releasing debts"?

Mr. Zwaig: What they are trying to do is separate the person from his debts, as opposed to the person from his assets. In other words, within 90 days of the individual going bankrupt he may obtain his discharge. However, the administration of his assets will go on until such time as all the assets have been realized and the creditors have been paid from such realization. To follow on what you are suggesting, Senator Connolly, what happens after he is discharged. Is he introduced back to the community as a person of full civil rights vis-à-vis the financial community.

The Chairman: There seems to be something contradictory there. When a person is declared a bankrupt there is a division made as between that person and others—he no longer has any debts. The administrator takes the assets and he has the obligation to deal with those debts. When he is subsequently discharged, or an order is made releasing him from his debts, why is that necessary? If you part him from his debts at the time he is declared a bankrupt, why is it necessary to do it all over again when he gets this form of discharge?

Mr. Baird: It is a question of the imposition of the status of a bankrupt. There is need for some form of record saying he no longer has the status of a bankrupt—if you are going to impose penalties on a person who has the status of a bankrupt.

The Chairman: This bill says that when he becomes a bankrupt there is this division. He no longer has responsibility for his debts. The administrator or the trustee takes over all his assets and administers them. If the bankrupt wants to be discharged and he goes to the court, the court makes an order releasing him from his liability.

Mr. Baird: That is the present law.

The Chairman: What is the difference under the bill? He gets an order of non-responsibility for debts.

Mr. Baird: It does not say what he is not responsible for. The bill talks about the certificate of non-responsibility and it says that the certificate of non-responsibility shall include in it a statement that the bankrupt did nothing to aggravate substantially his insolvency or inability to pay his debts. That is section 206.

Senator Flynn: It does not say he ceased to be a bankrupt.

Mr. Baird: No, it doesn't.

Senator Connolly: It seems to me that what the chairman is saying is this, that by the very act of bankruptcy the individual is separated from his debts and there is a limit of liability then for the future in respect of those debts, and that liability is limited to the assets that he has at that time, so why do you need a certificate of non-responsibility? Surely you get that by the declaration of bankruptcy—which is what your point was, Mr. Chairman.

The Chairman: Yes, except that Mr. Baird pointed out that in the order that the court would make there would be certain conditions. One condition in the certificate would be that he had done nothing to aggravate the condition of bankruptcy. Is that right?

Mr. Baird: It must be in the certificate of non-responsibility.

The Chairman: Yes.

Senator Cook: And it did not offend against section 200. If you read sections 203 to 206, in every case he is referred to as "the bankrupt"—"the bankrupt," "the bankrupt,"

"the bankrupt". In other words, all that happens is that the bankrupt gets the certificate of non-responsibility, but he still is a bankrupt and cannot be a director of a company.

Mr. Baird: We have to change that.

The Chairman: You have made a note there?

Mr. Baird: Yes.

Senator Flynn: On the present concept of discharge, I do not dispute the procedure, but it seems to me that the concept of discharge should be retained in order to show that the bankrupt is one who is under the liability and has not been discharged. Once he has been discharged, it should be clear that he is not a bankrupt any more, and if that is not provided for under the act it would create a lot of confusion.

Mr. Zwaig: There is probably another omission in the act as well. Under the present act, when a bankrupt applies for his discharge, three choices are available to the courts. They are to give him a complete discharge, or a suspended discharge, or order him to meet certain obligations and when he fulfils them he gets his discharge. Now they are saying that when the individual bankrupt is discharged, either within the 90 days, or, if he has aggravated his bankruptcy and shown cause he gets his discharge in five years. There is no intermediate period between 90 days and five years, as I read it. Furthermore, there does not seem to be any penalty within the five years. Perhaps he should be depositing after-acquired property or making additional contributions other than the assets that were found by the trustee on the date of his bankruptcy.

Senator Connolly: That negates the proposition that there is a limited liability available to him by the declaration of bankruptcy, does it not? If you use after-acquired debts, or if you use other assets than those that went into the bankrupt's estate, that does not seem right.

Mr. Baird: Our society seems to demand that. The problem arises where a person has great potential or earning capacity and goes bankrupt. Society is very reluctant to see him discharged free and clear of his debts and continue to earn a large salary. I am thinking of the professional man such as a doctor, laywer or dentist. The creditors seem to feel that they should be entitled to a portion of that earning paid to the trustee in bankruptcy for distribution amongst creditors.

Senator Connolly: That is a reasonable proposition. Otherwise some would declare bankruptcy just to write off their debts and start all over again. It would be just a way of getting rid of debts.

Mr. Zwaig: It could mean that an unscrupulous individual may continuously go through the same process; he could on the eve of a windfall go into bankruptcy.

Senator Cook: Another point that has been raised may be answered by sections 221 to 223. Section 223 says that "where a person ceases to be a bankrupt, any statutory disqualification or incapacity by reason of the bankruptcy ceases."

Sections 221 and 223 may go a long way to meet th e objection just made. It says "ceases to be a bankrupt, any statutory disqualification or incapacity by reason of the bankruptcy ceases." So ceasing to be a bankrupt may be the answer to the problem.

Senator Connolly: But there is no way in which you can cease to be a bankrupt.

Senator Cook: After five years.

Senator Connolly: But there is no discharge, as is available under the present act.

Senator Cook: No.

Mr. Baird: A certificate of non-responsibility is what we think of as a discharge under section 221. It provides that a person ceases to be a bankrupt when the administrator issued the certificate of non-responsibility.

Senator Cook: That is under section 205.

Mr. Baird: Yes, under 205.

Senator Flynn: Is there any other form of certificate of non-responsibility than the one provided in section 206?

Mr. Baird: Not to my knowledge.

Senator Flynn: How can you apply that to one who does not qualify to get the certificate in that he did nothing to rectify substantially the cause of the inability to pay debts? How does he get the discharge?

Mr. Baird: He would only be discharged or cease to be a bankrupt five years from the the date of bankruptcy. Subsection 221(1)(e) provides that.

Senator Flynn: Then what kind of certificate would he get?

The Chairman: All I see in section 206 is that it shall be in the prescribed form—which means it is going to be dealt with by regulation.

Senator Flynn: But it is compulsory to include in it a statement that the bankrupt did not aggravate substantially the insolvency or inability to pay his debts.

The Chairman: That is right.

Senator Flynn: I do not know how you can issue that kind of certificate to one who will not qualify for it.

The Chairman: You go to the court.

Senator Flynn: You can still be discharged and cease to be a bankrupt.

Senator Cook: After five years.

Senator Flynn: What kind of certificate would he get then?

Mr. Baird: Nothing.

The Chairman: Nothing.

Senator Walker: It is just automatic.

Senator Flynn: How would he prove that he is not a bankrupt?

Mr. Baird: You can go back under section 221.

Senator Connolly: That is useless.

Senator Flynn: You would have to go into the records of the court and check to see that five years had elapsed.

Senator Connolly: For commercial purposes that is useless.

Mr. Zwaig: Absolutely.

Mr. Baird: It would be much preferable to get a certificate which he could show to anybody when he applies for credit.

The Chairman: How do you satisfy yourself, then, once a person has been known to be a bankrupt and you are dealing with him at some subsequent date? How do you know if he qualifies for the 90 days discharge or for the five-year one?

Senator Flynn: Yes.

The Chairman: Where do you search to find that out?

Mr. Baird: The records of the Superintendent of Bankruptcy would be the place to search, or the local administrator's office.

The Chairman: Is there any provision for issuing a certificate as to the status of a person who at one time was a bankrupt?

Mr. Baird: I am not sure. I will have to check.

Senator Connolly: Under the present law can you resort to "after acquired assets" to apply to the debts?

Mr. Baird: Yes, you can. However, earnings are subject to the qualification that a man must be allowed a reasonable amount to pay his normal living expenses. Therefore, the court will only require him to pay a surplus over and above what he needs.

Senator Connolly: Does the present law allow the court to investigate the present status of the bankrupt?

Mr. Baird: Yes, and in every case in Ontario there is an affidavit filed. We call it the affidavit of earnings. This sets out the man's net earnings and it sets out his normal living expenses and it shows whether or not there is a surplus available for distribution among creditors. The court then looks at that affidavit and decides whether the expenses are reasonable. It has the right to make an order for payment, usually over a period of two years, of so much a month.

Senator Laird: Where is there a corresponding provision in this bill?

Mr. Baird: There is a similar provision in this bill. It is not as good as the existing act. It talks about an order vesting assets, the vesting of after acquired earnings over $500 in the trustee. That is clause 147, Mr. Zwaig tells me, on page 72.

A weakness in this provision is that there is no requirement for such an order to be served upon the employer of the bankrupt, and no requirement that the employer remit the funds directly to the trustee. This would have the effect of an attachment order. There is such a provision under section 48 of the Bankruptcy Act at the present time.

Also it is a question of whether or not the word "earns" in clause 147(1)(a) would cover a man who has a fluctuating earning ability such as a real estate salesman who one month might earn nothing and the next month might earn a large fee.

Senator Connolly: Or a professional.

Mr. Baird: Or a professional man earning fees.

Senator Flynn: How do you reconcile the provision in clause 147 with that in clause 145, which says that the property which is exempt from seizure under the laws of the province where the bankrupt resides does not fall into the estate, does not go to the trustee? In 147 they say that where an individual earns an income at a rate in excess of $500 a month, "the court, upon application, may make an order vesting in the trustee the whole or a part of such income or such property." I cannot reconcile that with clause 145.

Mr. Baird: Under the law of the province of Ontario only 30 per cent of earnings are subject to seizure.

Senator Flynn: It is about the same thing in Quebec.

Mr. Baird: This would make a larger proportion than 30 per cent subject to seizure.

Senator Flynn: Do you not think there is a contradiction between 147 and 145?

Mr. Baird: There clearly is a contradiction there.

Senator Cook: In clause 147 if he is spending actually $500, do you not think this should have some effect on the tax?

Senator Flynn: They do not need that, Senator Cook, if they apply clause 145, because it settles that the share of the income or the revenue which can be seized—

The Chairman: That portion ceases to be income of the bankrupt for all practical purposes.

Senator Connolly: Does it?

Mr. Baird: It does not say that.

The Chairman: But should it not?

Senator Connolly: You cannot have it two ways.

Senator Flynn: The tax people would not be agreeable to that.

The Chairman: They want the bankrupt to pay taxes on what he is using to pay his debts.

Senator Connolly: If he earns the income, then he is taxable on it. If the Bankruptcy Act comes along and takes away from him all his income over $500, then you are defeating the purposes of the Income Tax Act.

The Chairman: We will let them wrestle with that.

Senator Flynn: Some adjustment has to be made, nevertheless, between clause 145 and clause 147. We should keep in mind that the property available to the trustee for the creditors is that part which can be seized under the law of the province in which the bankrupt resides. That is a good rule.

Senator Connolly: It is just this kind of thing we have to watch, Mr. Chairman. One lawyer who has had some experience in bankruptcy practice and two academics are the people who devised this bill. They may not know anything about the tax law. We may very well be approving or passing legislation that might have serious effects on other legislation now on the books.

Senator Laird: Exactly.

The Chairman: We have not reached the point of starting on that problem yet, senator.

Senator Cook: Senator Flynn, what you say only applies to the date of the bankruptcy. We are now talking about "after acquired" earnings.

The Chairman: Senator Flynn, I should draw your attention to page 73, clause 147(3) which says:

> For the purpose of subsection (1), the word "income" means net income of the individual as determined for the purposes of the Income Tax Act in the annual return filed under that Act.

Senator Flynn: That may solve Senator Connolly's problem, but not mine. They say here that the net income has to be calculated as for the purpose of the Income Tax Act. You have your personal exemption, the exemption for your spouse and children, of course, but that does not prove anything. So far as I am concerned, I want to reconcile the principle laid down in clause 145 with the possibility under clause 147 of the court's making an order vesting in the trustee the whole or a part of such income or such property. It seems to me that that is in direct conflict with the proportion which can be seized provincially.

Mr. Baird: The solution to our problem, Senator Flynn, would be to say, "provided that such amount shall not exceed the amount that is available for seizure under the applicable provincial law," and that would solve that problem.

Senator Flynn: That is right. Under the present legislation the income earned after the bankruptcy, that part which can be seized, is deemed to belong to the trustee. I know that generally speaking the trustee does not always collect this seizable portion of the income, but normally it belongs to him.

The Chairman: But there should be some limit there.

Senator Flynn: But you have here 90 days when he can get his discharge.

The Chairman: But there should be some limit on the amount. If you take $500 a month without regard to anything else, then you may be taking too much or too little, depending on the circumstances.

Senator Laird: Incidentally, in that same connection, what about after-acquired assets like a bequest? Is there anything in the act that covers that?

Mr. Baird: There is provision for after-acquired assets such as bequests in section 147(1)(b), where it talks of property acquired in excess of that necessary to maintain a reasonable standard of living. The court, upon application, may make an order vesting in the trustee the whole or a part of such income or such property.

Senator Flynn: But not after he has been discharged.

Mr. Baird: Not after he has been discharged, so if the 90-day rule comes into effect, this is a meaningless provision because nothing will happen in the 90 days.

Senator Connolly: I would like to ask a question related to this point, but on another aspect of it. You say that at the present time there is an affidavit filed by the bankrupt as to after-acquired assets.

Mr. Baird: No, as to his earnings.

Senator Connolly: Is there cross-examination on it?

Mr. Baird: There is the right to cross-examine on it if a creditor attends and opposes the application.

Senator Connolly: Does the registrar under our present law examine the affidavits carefully or is it pro forma?

Mr. Baird: They are generally pro forma and they are accepted as filed unless a creditor comes along and opposes.

Senator Connolly: The onus is on the creditor to step in?

Senator Flynn: Except that the trustee has the obligation to file a report, and may in his report say that the bankrupt is not entitled to a discharge.

The Chairman: I suppose he could say that the bankrupt has underestimated his earnings.

Senator Flynn: But the trustee has the obligation to say that the bankruptcy is the result of fraud, and so normally there would be no discharge.

Senator Connolly: Could the trustee, for example, ask for the production of his income tax returns?

Mr. Zwaig: He does during the normal course of his administration because he is required to file income tax returns for the split period in the year of bankruptcy. There would be two tax returns filed.

Senator Connolly: Just for the record, what I am pointing to is this, that under the existing law, where you have an officer of the court, the registrar in bankruptcy, sitting in a judicial capacity, looking at this affidavit and knowing too that there can be cross-examination by the trustee or by any interested creditor, then you have a judicial process there under auspices which everyone recognizes. Whether that process is going to be continued under the new scheme and whether that new process is going to be as valuable as the existing one—

The Chairman: The process is still there. You have to go to the court to get your discharge.

Mr. Zwaig: No. It is the administrator who will be issuing that order.

Senator Connolly: There is a substitution of the judicial function by an administrative tribunal.

Mr. Baird: That is correct. It is solely at the discretion of the administrator in the first instance whether the bankrupt gets his discharge or not. If the administrator says no, then the bankurpt has to go to court by way of appeal. But the creditor has no input into this.

Senator Connolly: But if you go to the court by way of appeal, there will be no more judges in bankruptcy and you will just have to take your chance on whatever judges are available.

Senator Flynn: That may be the case today. We do not have very much expertise under the present system because any judge of the Supreme Court of Ontario or any judge of the Superior Court of Quebec or elsewhere can sit in bankruptcy; they are all qualified to sit in bankruptcy.

Mr. Zwaig: In Montreal we certainly have a roll of judges who sit in bankruptcy. The roles may change, but certain judges are specifically assigned to spend a large portion of their time in the bankruptcy division.

Senator Flynn: But if the Chief Justice says, "I will use you in bankruptcy because you know more," there is no more control over that. Any judge of the Superior Court in Quebec may sit in bankruptcy.

Mr. Zwaig: Yes, he may, but the practice has been that he does appoint bankruptcy judges who are almost specialized in the field.

Senator Flynn: That has not been evident in the District of Quebec.

Senator Connolly: Well, I think it is in Ontario.

The Chairman: I am not sure which part of your statement we should accept. Is it that there is no evidence of that?

Senator Flynn: There is no evidence that they use judges who have expertise in bankruptcy or that the Chief Justice has a roll of specialized judges for the purpose of bankruptcy cases.

The Chairman: But he has the authority to do that.

Senator Flynn: Oh yes, he can assign a judge. It is done in Montreal in criminal cases, for instance. You have only a few judges who know something of criminal law and generally they use them for criminal cases; but sometimes you may have a judge who does not know a thing about criminal law.

Senator Connolly: Am I right about Ontario?

Mr. Baird: Yes.

Senator Connolly: Are there in Ontario special judges who are experts in bankruptcy and who sit on bankruptcy cases?

The Chairman: There is a bankruptcy judge.

Senator Laird: There always has been.

Mr. Baird: And this is because the present Bankruptcy Act says that the Chief Justice of the province may designate a judge to hear bankruptcy matters; and as a result of the existing Bankruptcy Act, the Chief Justice of Ontario has designated one judge to hear bankruptcy matters. He hears all the bankruptcy matters from the province, and this has worked out extremely well because he has developed an expertise.

Senator Flynn: But they would be able to do the same thing under this legislation?

Mr. Baird: No, they will not. They have the right to do it but they may not do it.

Senator Flynn: But the name of the court may not appear to be as it is now, like the "Supreme Court of Ontario, Bankruptcy Division". The "Bankruptcy Division" may disappear. The Chief Justice may have a roll prepared for bankruptcy cases.

Mr. Baird: He has the right to do that under the new act, but because there is no provision in the new act suggesting that he should do it, then I am doubtful if he will do that.

Senator Flynn: In the present legislation there is only the fact that the court is named "Bankruptcy".

Mr. Baird: There is a specific provision in the existing bankruptcy legislation which says that the Chief Justice may designate a judge to hear bankruptcy matters. In the case of Ontario it is the Chief Justice of Ontario. And this provision has been omitted from the new bill.

Senator Flynn: You mean under this present legislation, section 150?

Mr. Baird: It would be around section 150.

Senator Walker: Why would that be?

Mr. Baird: The reason given in the background paper was the suggestion that there was a problem of determining whether the matter should be heard by the Bankruptcy Court or by the regular civil court. In my experience this has not been a serious problem. If it has arisen, then it has been a case of one in a thousand. The advantage of having a separate court and a separte judge familiar with the matter is so much greater than the possible difficulty of determing jurisdiction. That has not been a serious practical problem.

Senator Connolly: Could I raise another point, Mr. Chairman, in connection with section 207? I take it that that should be enlarged to allow creditors or other interested people to make the application that the administrator can make.

Mr. Baird: Yes. That is correct.

Senator Connolly: You have a note to look into that?

Mr. Baird: Yes.

Senator Flynn: Coming back to the point of clause 155, this contains a suggestion.

Mr. Baird: Yes. And this suggestion is lacking in the new bill; but the suggestion has been followed in Ontario and Alberta.

Senator Flynn: Well, it was to some extent followed, I think, even before this, because this was enacted on the occasion of the last revision of the bill. I do not remember having seen it in the 1949 version.

Mr. Baird: I think it came in in the 1949 version. That is my recollection.

Senator Connolly: Probably, Senator Flynn, the reason it is not done in the district of Quebec is that business around there is so profitable there is no need for it!

Senator Flynn: It is probably because there is no judge who has the expertise.

The Chairman: Have we finished with that subject matter?

Honourable senators, a paper was distributed this morning entitled, "Proposed System of Bankruptcy Administration under Bill C-60". It will only take a few minutes to deal with. The point is, if you assume that the present bill, in its present form, becomes law, this will be the administrative setup. Go ahead, Mr. Baird.

Mr. Baird: I have tried to outline to you the functions that will be performed by the administrator. This is a new name. The bankruptcy administrator has taken over certain of the functions of the official receiver, who is an employee of the federal government. The new administrator will be an employee of the federal government, but he has also taken over new functions, or has received new functions. He has received some of the functions that the trustee in bankruptcy presently performs, and he has

received some of the functions that the registrar in bankruptcy has performed.

Where under "present bankruptcy act" I have put dashes, that means that it is a new function that is performed by the administrator, and new duties which are not being performed by any officer, either the registrar, official receiver or trustee, at the present time.

I think the conclusion I reached is the obvious conclusion, namely, that the additional functions being granted to the official receiver will create additional requirements for employment, and a large staff. New offices will have to be established throughout Canada. If the service is going to be available, particularly with respect to the small debtor program, we will have to establish department offices in each of the larger towns and cities throughout Canada, otherwise the service will not be available to the people. A large increase in the staff will therefore be required to administer bankruptcy matters.

Senator Connolly: It does not seem to matter any more.

Senator Laird: It is going to matter before we get through with this bill, as far as I am concerned.

Senator Walker: Is this necessary, Mr. Baird, in your opinion? Is this great increase in personnel necessary?

The Chairman: I would say very substantially.

Mr. Baird: If you pass the bill in its present form you have to have an increase in staff. There is just no question of that. The clauses will not work, will not be administered properly, unless there is a large increase in staff. Whether the bill should be passed in its present form is a question for this committee.

Senator Cook: Supposing all this takes place, what would be the general benefits which would accrue to everybody? What changes would take place over the present administration of the law? Would the creditors get more, for instance?

Mr. Baird: We have introduced a new system for the small debtor, under which the small debtor is being encouraged to make small payments to his creditors instead of going bankrupt. This is one of the reasons given for the proposals in the new bill.

You ask how the system will be changed. There will be a service available to the small debot that is not available at the present time.

The Chairman: Except this: it is really putting into this bill Part X of the present act. That is the part of the present act that deals with the orderly payment of debts. That, however, is not in effect in the statute. All it says is that any province may, by statute, or order in council, adopt the provisions of Part X. As Mr. Baird has told us, some of the provinces, perhaps four or five, anyway, have adopted he provisions for the orderly payment of debts, and so have made effective, in their jurisdiction, the provisions—all of them or some of them—with respect to the orderly payment of debts.

What they are trying to do here, with the administrator—and it may be a very doubtful area constitutionally—is to have an administrator who will administer what was formerly Part X, and which was not part of the bankruptcy law. It was really for the guidance of the provinces, who wanted to have some direction in the way of orderly payment of debts. This is a radical departure.

Mr. Baird: Yes. This is mainly where the large increase in staff will be needed. It will be to administer this small debtor program.

Senator Connolly: Is it an attempt on the part of the federal authority to say, "We know that this is important, we know it is expensive. We will do it, and you will not have the expense of it." Is that the justification?

Mr. Baird: That is a very fair comment, yes.

Senator Connolly: Well, if it is not bankruptcy, as Mr. Chairman points out, the jurisdiction is not there, is it? This is dealing with property and civil rights in the provinces.

Mr. Baird: It is in a fuzzy area. It is a case where the provinces, up till now, have introduced provisions such as the consolidation order in the small claims court, and the Lacombe law in the province of Quebec, for periodic payment of debts. The provinces have entered this field because up until Part X of the Bankruptcy Act was passed, federal law did not cover this problem. The new Part X has not been introduced into Ontario or Quebec, because they were concerned with the cost of administration. This is what I am told. The provincial authorities did not introduce it for that reason.

Senator Connolly: Do you know if there was any exploration of the idea that the provinces should do it, but perhaps in the context of some arrangement whereby federal authority might help financially to defray the cost?

Mr. Baird: I am not aware, sir.

Senator Molson: This would be like the provincial police problem.

The Chairman: Senator Connolly, after the economic statement we received last night, the question is whether we should approve of anything that would increase expenditures by the federal authority.

Senator Cook: What other benefits would the act bring about?

Mr. Baird: There is a transfer of functions from the registrar in bankruptcy to the administrator, with respect to taxation of costs. I do not think this creates any additional expense. I think it is a retrograde step, because I think the registrar will have, or would have, better qualifications to do this job than the administrator would have; but I do not think it would create any additional cost. There is the responsibility of investigating the affairs of the bankrupt, which is enlarged under the new provisions, such as to determine whether or not the bankrupt should be discharged. This is an obligation of the trustee in bankruptcy at the present time, and that is being delegated to the administrator.

Senator Connolly: Do you mind if I stop you there? If it is an obligation of the stop you trustee in bankruptcy, he has to do it through the court. He has to go to the registrar to get an order, does he not, or to the judge?

Mr. Baird: Yes.

Senator Connolly: So is the trustee doing it under the authority of the court?

Mr. Baird: He makes a report to the court, and the court then makes the judicial decision as to whether he should be granted the discharge. In this case, under new bill, the

administrator does both. He makes the investigation and then makes the decision as to whether or not the man should be discharged.

Senator Cook: As to whether he ceases to be a bankrupt.

Mr. Baird: Yes. That is the right term. He than has the power also to apply to have an agent of the bankrupt company, such as an officer or director of the company, deemed to have the status of a bankrupt. That is a new function that does not exist under the present act.

Senator Connolly: But could be performed.

Mr. Baird: It could be performed. But it also involves, clearly, investigating the affairs of every bankrupt corporation, which is an extension of responsibility.

Senator Laird: Can you by any chance give us numerically the number of functions heretofore performed by the court under the existing legislation which are proposed under this bill to be transferred to the administrator?

The Chairman: You have a list there.

Senator Laird: I know, but has either of you two expert witnesses actually added them up? I am aking this for the sake of simplicity.

The Chairman: You mean you want a score sheet.

Senator Laird: That is right.

Mr. Baird: From a quick reference I find that there are six functions of the court that have now been assigned to the administrator.

Mr. Zwaig: But there are important functions of the court, or that we in the field of bankruptcy practice feel are important, and we would be happier, in most instances to have a judicial decision as opposed to an administrative decision. There are other acts presently administered by departments where they have tendered internal decisions which are never published so that an applicant to these administrative tribunals does not know what internal decisions or interpretations have been made. I think that this could find its way into the bankruptcy administration field which Act has been intended for the public good.

Senator Walker: I quite agree.

Senator Cook: And there are some other benefits in the Bankruptcy Act too?

Mr. Baird: Yes. I think one benefit is that the administrator will now act as chairman of all meetings of creditors. I think this is a good thing and creates an impartial chairman as opposed to cases at present where the trustee acts as chairman of a meeting of creditors to consider a proposal. The trustee in those meetings has to make a report as to his recommendations and therefore after he has made his report he loses his appearance of impartiality. This puts the administrator in now, and I think that is a good thing.

Senator Connolly: Suppose we are going to have an administrator and he is going to continue the practice as at present, what change could be made in the existing setup to allow for the appointment of a non-partisan chairman?

Mr. Baird: A very simple change, an amendment to provide that the official receiver would act as chairman of all meetings of creditors, including meetings to consider proposals. It would be a useful change.

Senator Connolly: That could be done under the present legislation?

Mr. Baird: Yes.

Mr. Zwaig: Even the facility of official receiver acting as the public trustee of wage earners and consumers, bankrupts and debtors, could also be extended because it is being done now in a very limited fashion. The proposal section of the existing Bankruptcy Act could be enlarged to include that the administrator or official receiver perform these arrangements for the consumer and wage-earner debtors.

Senator Cook: We have in the existing Bankruptcy Act 213 sections. The new one has 410. That means 200 more sections. We have all these definitions changed, and I want to know where is the benefit.

Mr. Baird: I am sorry, sir, I was talking only about the change of administrator. There are benefits in the other sections, too. They include the provisions dealing with the rights of trustee to take over leases when the bankrupt company was a lessee. There are provisions that cover a situation where the trustee was holding assets in trust for a third party. We now have got provisions for bankruptcy when a stockbroker goes bankrupt. These are problems in the past; they are now being cleared up and improved by the new act. We have not come to these provisions yet.

The Chairman: We have them on our list.

Mr. Baird: There are many technical improvements in legislation that the new act covers.

Senator Connolly: Cannot all these amendments be made without making a radical structural change in the present setup?

Mr. Baird: Yes, it is not necessary to change the structure to make the improvements that have been suggested in the new act. They could all be incorporated into the existing act.

Mr. Zwaig: At the same time we are discarding a large volume of jurisprudence by the introduction of the new act.

Senator Cook: The new act comes in and all the old stuff is swept out. That method did not do an awful lot with the Income Tax Act when they did it.

Senator Laird: Exactly. That was a boner we pulled in the Income Tax Act.

Mr. Baird: They have reduced the priority of the Crown with respect to preferred creditors. We think that this is a benefit in that ordinary creditors will become interested in the administration of bankrupt estates and take a keener interest in the administration. They have done away with the concept of a "deemed trust." At the present time Canada Pension Plan payments, vacation pay and these type of obligations are now considered to have prior rights over the trustee in bankruptcy. This type of concept has been abolished. I am talking somewhat at random about the various benefits and improvements in the new act. All of them could be incorporated by way of amendment into the existing act, that is, this type of change.

The Chairman: I take it you would not contemplate that a person who is in receipt of unemployment insurance benefits is likely to be concerned in the bankruptcy provisions.

Mr. Baird: Yes, frequently a man who is in receipt of unemployment benefits goes bankrupt.

The Chairman: If such a person could be declared a bankrupt, would that expose such payments to the administrator or whoever may be administering the estate?

Mr. Baird: It might. The problem is that they have only exempted assets which are exempt under provincial law. Unemployment insurance benefit is exempt under federal law. I think this is an oversight but not an intentional one.

The Chairman: You have noted that, have you?

Mr. Baird: Yes.

Senator Molson: And you will get the wording for it?

The Chairman: If there are no other comments—I think this would be a handy reference to show the setup and a good working paper.

Senator Connolly: Are we appending it to our proceedings of today?

The Chairman: If you think it would be valuable to do so, we will

Senator Macnaughton: Have we done it in the past with the other submissions?

The Chairman: No. This would not be a case of appending a submission. It would be really part of the evidence of Mr. Baird. We have been making a practice of not printing submissions in the report of our proceedings. The chief reason for it was that we did append the submissions in the past when we were having the hearings on the White Paper and the Income Tax Act and the net result was that our bill from the Printing Bureau was for a very substantial amount, really moving money from one pocket to the other, so we decided we were not going to increase our costs of administering the affairs of this committee by printing the submissions. If we need any part of them they are available and we can quote from them. Over in the House of Commons I see they are still carrying on the practice of printing some of the submissions.

Senator Macnaughton: Mr. Chairman, I did not mean that; I meant the memorandum submitted by our experts. It would complete our information.

The Chairman: The memorandum on the proposed system of bankruptcy administration?

Senator Macnaughton: And the other one, on secured creditors and things like that.

The Chairman: The idea was to give them to you.

Senator Connolly: May I interject a word? We expect to get a submission from the Canadian Bar Association, and if they had these documents it might help them in the preparation of their submission.

The Chairman: The substance of what was said today will be in the transcript of today's proceedings.

Senator Connolly: Very well.

The Chairman: And while it might make a search of the clauses easier, after all, if they are undertaking a study of the bill, they are going to be looking at the clauses anyway.

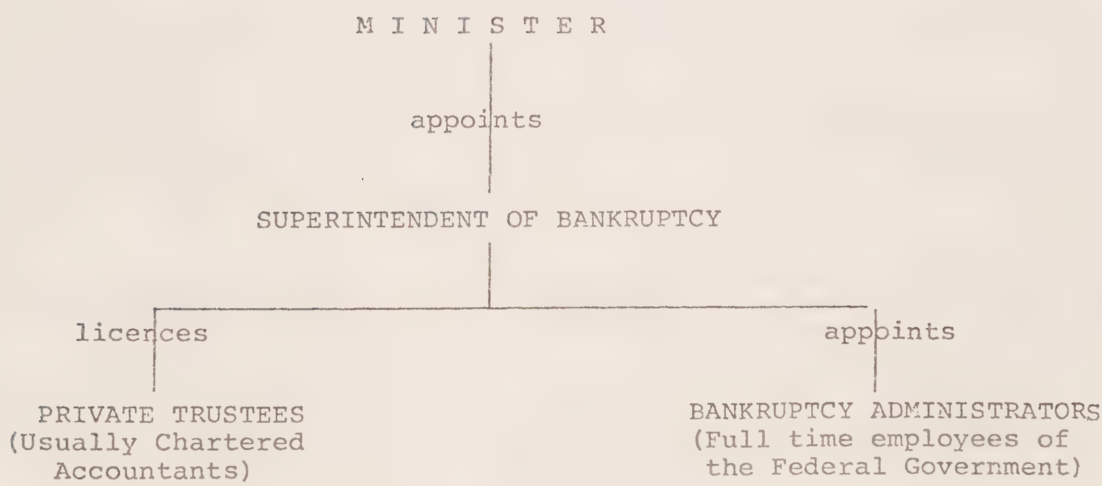
I think there is a good argument for attaching to the proceedings of today's committee meeting this particular statement we have dealing with the proposed system of bankruptcy administration under Bill C-60, because this presents the picture to you on the basis that Bill C-60 becomes law in the form in which it is, and here are the results so far as the administration is concerned. If the committee agrees, this will be appended at the end of Mr. Baird's evidence.

Hon. Senators: Agreed.

The Chairman: Mr Baird, you have finished your part?

Mr. Baird: Yes

PROPOSED SYSTEM OF BANKRUPTCY
ADMINISTRATION UNDER BILL C-60



SUMMARY OF BANKRUPTCY ADMINISTRATIVE FUNCTIONS

FUNCTION	PRESENT BANKRUPTCY ACT	BILL C-60
Receive Voluntary Petitions	Official Receiver	Administrator S. 127 (1), p. 65
Appoints Trustee upon Filing of Voluntary Petition	Official Receiver	Administrator S. 127 (2), p. 65
If Licence of Trustee is Cancelled, not Renewed or Surrendered or Trustee dies or Becomes Incapacitated:		
(a) May become Trustee	Official Receiver	Administrator S. 25 (1), p.19
or		
(b) May Appoint New Trustee	Official Receiver	Administrator S. 25 (2), p. 19
Becomes Trustee if no Trustee Appointed under Part V	----	Administrator S. 25 (1)(b), p. 19
Becomes Trustee if Assets Remain to be Realized or Duties to be Fulfilled after Passing of Final Accounts	Trustee	Administrator S. 25 (1)(d) p. 19
Taxation of Accounts of Solicitor	Registrar	Administrator S. 37 (2)(a) p. 24.
Taxation of Accounts of Accountant for Services Rendered to Bankrupt Estate	-----	Administrator S. 37 (2)(a) p. 24

FUNCTION	PRESENT BANKRUPTCY ACT	BILL C-60
Taxation of Accounts of Trustee or Interim Receiver	Registrar	Administrator S. 37 (2)(b) p. 24
Authorization of Payment of an Advance on Account of Remuneration to Interim Receiver, Trustee, Solicitor or Accountant	Registrar	Administrator S. 38 (2) p. 25
Taxation of Accounts of Administrator Acting as Trustee	Registrar	Superintendent S. 44 (2), p. 28
Investigation of Debtor when Proposal Filed	Trustee	Administrator S. 55 (1), p. 33 Trustee S. 100 (1), p. 53
Receive Requests for Arrangements by Consumer Debtor	----	Administrator S. 64 (3)(a) p. 37
Prepare Arrangements for Consumer Debtor	----	Administrator S. 65 (1), p. 37
Notifies Creditors of Composition Arrangement	----	Administrator S. 69 (2)
Rules upon Objections to Extension Arrangements	-----	Administrator S. 75 and S. 76 p. 41
Supervises Consumer Arrangements	-----	Administrator S. 80, p. 43
Advises Creditors re Terms of Arrangement and Debtor's Performance Thereunder	-----	Administrator S. 82, p. 44

FUNCTION	PRESENT BANKRUPTCY ACT	BILL C-60
Distributes Funds Under Consumer Arrangement	----	Administrator S. 85, p. 45
Extends Time for Payments Under a Consumer Arrangement	----	Administrator S. 87, p. 46
Receives Notices of Intention to make a Commercial Arrangement	-----	Administrator S. 94 (1), p. 50
Receives Proposals for Commercial Arrangements	Official Receiver	Administrator S. 95 (1), p. 50
Receives Report of Trustee of his Investigation of the Affairs of the Debtor who filed a Commercial Arrangement	-----	Administrator S. 100 (2), p. 54
Appoints Trustee and makes a Bankruptcy Order if Proposal for Commercial Arrangement is not Accepted	Official Receiver	Administrator S. 106, p. 56
Appoints the Trustee when Bankruptcy Order is made After the Filing of an Involuntary Petition if the Court does not Appoint Trustee	-----	Administrator S. 143 (4), p. 70
Receives a Copy of Inventory Prepared by Trustee	-----	Administrator S. 186 (4), p. 93
Party to Proceedings Commenced by a Creditor at his Own Expense	-----	Administrator S. 194, p. 97

FUNCTION	PRESENT BANKRUPTCY ACT	BILL C-60
Determines when Estate is Fully Administered	Registrar	Administrator S. 195 (3), p. 98
Makes Orders for Redirection of Mail	Registrar	Administrator S. 197 (1), p. 99
Inquires into Causes of Bankruptcy and Conduct of Bankrupt	Trustee	Administrator S. 199 (1), p. 100 S. 200, p. 101
Conducts Examinations of the Bankrupt	Official Receiver	Administrator S. 199 (2), p. 100
Files a Caveat Preventing Discharge of Bankrupt	----	Administrator S. 202, p. 102
Issues a Certificate of Non-Responsibility	Court	Administrator S. 203, p. 102
Opposes Application of Bankrupt for Certificate of Non-Responsibility	Creditor	Administrator S. 204, p. 103
Applies to the Court for an Order Declaring an Agent of the Bankrupt to have Imposed upon him the Status of a Bankrupt	----	Administrator S. 207, p. 104
Requires an Agent of the Bankrupt to perform the Duties of a Bankrupt	Official Receiver	Administrator S, 231, p. 112
Chairman of All Meetings of Creditors	Official Receiver - if a Bankruptcy Trustee - if a Proposal	Administrator S. 279, p. 139

FUNCTION	PRESENT BANKRUPTCY ACT	BILL C-60
May Require the Trustee to Call a Meeting of Creditors	-----	Administrator S. 280 (2)(b), p. 140
To Call a Meeting of Creditors when Trustee is Unavailable or Fails to do so.	-----	Administrator S. 280 (3), p. 140
Designate Place of Meeting of Creditors	Official Receiver	Administrator S. 283 (1), p. 141

COMMENTS

1. The responsibility imposed upon the Bankruptcy Administrator to administer arrangements for the consumer debtor will result in the establishment of department offices in all the large towns and cities throughout Canada.

2. The granting to the Administrator of the initial responsibility of determining whether or not a bankrupt should be released from bankruptcy will create a very heavy obligation on the office of the Administrator and it will be difficult for these duties to be performed properly within the ninety days allowed unless there is a large increase in the staff of the Administrator's office.

3. The right to apply to the Court to have the status of a bankrupt imposed upon an officer of the bankrupt corporation will also give additional duties to the Administrator which will require an increase in staff if they are to be carried out competently.

4. Minor functions in the administration of bankrupts' estates are transferred from the Trustee to the Administrator. This will result in additional costs to the taxpayer which are presently borne by the creditors of the individual bankrupt estate.

5. Providing that the Administrator shall act as Chairman of meeting of creditors to consider proposals for commercial arrangements, instead of the Trustee, is an improvement over the present Act. It permits an impartial person to perform the functions of Chairman. The Trustee named in a Proposal is expected to make a recommendation to the creditors as to whether or not a Proposal should be accepted. It is difficult for the creditors to accept the Trustee as being an impartial Chairman after he has made this recommendation.

6. The taxation of the accounts of solicitors, accountants, interim receivers and trustees by the Administrator has the effect of delegating judicial functions to a person who has many administrative functions. This is contrary to the suggestion in the Background Papers that administrative functions should be separated from judicial functions. In addition, there is a serious concern as to whether the Administrators will have the qualifications and experience necessary to properly perform these functions.

CONCLUSION

The provisions of Bill C-60 enlarging the responsibilities of the Bankruptcy Administrator as opposed to the duties presently performed by the Official Receiver will result in a large increase in the number of persons employed by the federal government to administer bankruptcy matters.

The Chairman: Now, Mr. Zwaig, what is the first topic you wish to deal with?

Mr. Zwaig: I will deal with exempt property.

The Chairman: What Mr. Zwaig is going to talk about you will find in the booklet that was described today. The first topic is exempt property which is not available to creditors. Would you pick it up from there, Mr. Zwaig?

Mr. Zwaig: Thank you, Mr. Chairman.

The bill envisages making a uniform exemption throughout the country for property which can be retained by the bankrupt, and, in fact, overrides the provincial exemptions. In essence, the bill says that if exempt property in excess of $3,000 is retained, then the bankrupt is not discharged from his debts. The bill is unclear as to the procedure, as to what happens. Does the individual have to turn over physically everything in excess of $3,000? If he retains it, he has gone into bankruptcy. It means that the 90-day discharge or the five-year discharge just does not apply to him; or, if he has gone into bankruptcy and if he wants to retain the excess he does not seem to be discharged from debts.

The Chairman: What do you mean by that? If a man goes into bankruptcy, $3,000 worth of his assets are exempt?

Mr. Zwaig: That is correct.

The Chairman: From the hands of the trustee. Is that correct?

Mr. Zwaig: That is right.

The Chairman: You mean that the debtor can determine what portion of his assets he will select to make up the $3,000?

Mr. Zwaig: That is correct.

The Chairman: And the deadwood he could turn over to the trustee.

Mr. Zwaig: That is correct. He can also decide on the other hand to retain $4,000 worth of property, in which case, according to the bill, he is never discharged from his debts.

Mr. Baird: But he can only retain exempt property. It must be in the category which would be exempt under provincial law.

The Chairman: In Ontario what is the exemption under provincial law?

Mr. Zwaig: We seem to have a number of exemptions in Ontario. Exempt from execution would be necessary wearing apparel up to a value of $1,000; household furniture to a value of $2,000; tools of the trade to a value of $2,000. In the case of a farmer, livestock, tools, equipment not exceeding $5,000 plus seed and feed for the livestock.

So they are, in fact, being a bit more restrictive than the exemptions of Ontario.

The Chairman: What you have enumerated for Ontario would amount to about $10,000.

Mr. Zwaig: That is correct.

The Chairman: But under this bill the exemption is $3,000.

Mr. Zwaig: That is right. Here is where the conflict really comes in. Take the farmer who is entitled to retain equipment, livestock and tools of a value of $5,000. If he chooses to retain the $5,000, it appears from the words of the bill that he is not discharged.

The Chairman: He can never get a discharge.

Mr. Zwaig: That is right, he can never get a discharge from his debts.

I have taken the liberty in my submission of listing the property exempt from seizure in Quebec under the articles 552 and 553 of the Civil Code of Procedure, and they as well are in excess of the $3,000 noted in the bill. I raise some of the following questions. Three are certain items under article 553 of the Civil Code of Procedure that are in fact declared unseizable by law. What happens to these? Was it really an omission on the part of the draftsmen of this clause? I can give you one or two examples such as pensions for widows of judges. These are unseizable. Certain moveable effects and possessions of a bonafide settler of a homestead. Items like family allowances paid in virtue of the Family Allowances Act. Those are unseizable and yet the Bankruptcy Bill provides for a global $3,000 figure.

The Chairman: It certainly looks as though we should pay some attention to this.

Mr. Zwaig: I think so. In addition to that, I question the basis of valuation, and I would "tick" it or "red star" it, as we used the expression last week. What we envisage here is the trustee—that may be the bankruptcy administrator—has the power to enter any premises where he believes there is property of this bankrupt. He makes a valuation of the exempt property. Once the valuation has been made, it appears that the trustee can revalue such exempt property and must give notice to the bankrupt of such valuation.

What I would like to see is an independant valuator appointed, as opposed to the trustee, and have him show reasons and the basis for his valuation.

The Chairman: Is there any right to question the revaluation?

Mr. Zwaig: The bankrupt has the right to appeal within 15 days of this valuation. He has to serve notice of appeal on the trustee.

The Chairman: To whom does he make the appeal?

Mr. Zwaig: To the court.

The Chairman: I thought you were going to say to the administrator.

Mr. Zwaig: There are some things in this bill which I find glaring. For example, you have an administrator making a decision which subsequently has to be appealed by the court. You have a bankrupt doing the appealing. Where does he get the money to do all this appealing?

Senator Cook: You make that point, too, on the life insurance policy. In other words, it says in the act if he puts up the cash surrender value of the life insurance policy he can have it. There are many cases where a man in middle age has a good life insurance policy, but might be short of cash. How about changing that so that the trustee is entitled to the loan value of the policy and permitting the bankrupt to borrow from the company? The bankrupt is not allowed to borrow, but if he is allowed to borrow on the loan value of the policy from the insurance company, then the trustee gets his portion from the cash value of it and in the meantime he has a breathing space to carry on the policy.

The Chairman: If he can find any money.

Senator Cook: He would have a year perhaps in which to find money. In the meantime if he tried to get insured *de nova* at 45 years of age, it would be more costly.

Mr. Zwaig: It is certainly a contradiction to the rehabilitative aspect of it.

Senator Cook: Exactly.

Senator Molson: Mr. Chairman, is there any present corresponding figure to this $3,000, and the other figures for wearing apparel, $1,000, and household furniture, $2,000? Is there any existing number that corresponds with this?

Mr. Baird: There is no existing number in the present act. The present act specifies that all assets which are exempt under provincial law are exempt for the purpose of the Bankruptcy Act without limitation.

The Chairman: And that is the way it should be.

Senator Molson: It seems to me that when you write into law some fixed numbers like this, in this day and age of inflation—and it looks like it will continue over another long period of time—it seems to me to be rather futile to pick these numbers, because five years from now they probably will not be very useful.

Mr. Zwaig: That is a point well taken. What they have tried to do is this, Senator Molson. The office of the superintendant in bankruptcy has found that the amount of exemptions vary quite substantially from province to province, and this is why they thought that this would bring about some uniformity across the country. I think it is in contradiction with provincial legislation, and in addition to that I think we have the problem of including or creating difficulties where none existed before by not including certain exemptions, not only under provincial legislation, but there are a number of federal acts which provide exemptions.

Senator Molson: The point I am trying to make is illustrated in the Civil Code of Quebec, where in Article 552 (5) it says, "if he is a carrier, commercial traveller, or needs the same to earn his livelihood, either one horse and its harness, one summer vehicle and one winter vehicle, or one motor vehicle;" That is rather out of date, particularly the "one horse and its harness".

Senator Cook: Going back to the $3,000, I notice the section says "$3,000 or such greater amount as may be prescribed."

Mr. Zwaig: This is prescribed by regulation when the regulations are subsequently put forth. It is not a fixed figure.

Mr. Baird: But if you include in that allowances that would normally be exempt, you reach the $3,000 figure very quickly.

Mr. Zwaig: It is "$3,000 or as may be prescribed by existing legislation."

Mr. Baird: Give a minimum of $3,000 and a maximum of what is permitted by provincial law.

Senator Cook: But it says "in excess of $3,000 or such greater amount—"

Mr. Zwaig: I think that the "3,000 or such greater amount as may be prescribed" is prescribed in the regulations that will accompany this act when it is in its final form.

The Chairman: You must appreciate, Senator Cook, that in the present act all the exemptions Mr. Zwaig is talking about are provided, and they are excluded here and you have no assurance that the regulations will increase the $3,000 amount. I am sure that when the departmental representatives come before us they will emphasize the right by regulation, but that is entirely different from having a statutory exemption.

Senator Laird: And it is a practice that I do not like anyway. But to put it bluntly to these witnesses, what is wrong with leaving it on the basis of provincial exemptions as they exist?

Mr. Baird: Nothing. It is working extremely well and I have seen no inequities. I have seen no problems.

The Chairman: And when you say provincial exemptions, remember this would have an effect on certain federal exemptions as well.

Mr. Zwaig: That is correct.

The Chairman: We would be building ourselves into a very small box.

Mr. Zwaig: My second submission is on Release of Debts. The proposed bill provides that certain debts will be released once the individual complies with retaining only this $3,000 exemption, and it is an all-defining clause as to the debts that are going to be released, because they refer to them as admissible claims in bankruptcy. It is interesting to note that the admissible claim is one which the debtor owes at the date of bankruptcy regardless of whether the debt is liquidated or not, absolute or contingent, certain or litigious, or payable immediately or in the future.

Mr. Baird: That is the way the present law stands. The present law says that if it is a contingent claim, then the court has a right to determine the amount of the claim and also whether it is provable. But the debtor is only released under the present act from provable claims. I think he

should be released from all claims arising prior to the date of bankruptcy so it would be my suggestion that this section should stand as is.

The Chairman: Which is the present section?

Mr. Baird: Section 95 of the old Bankruptcy Act.

The Chairman: Then you would take out section 144?

Mr. Baird: No, I am sorry, I would leave in section 144. I think the wording in the new bill is satisfactory and it is an improvement over the existing section 95. It is almost the same, but I think this is an improvement over the old section 95, so I would leave it the way it is in the new bill.

Mr. Zwaig: The section on the release of debts also provides that the release of the debtor does not prevent the secured creditor from realizing or dealing with his secured property subject to the security interest that he has. However, there are certain restrictions on that secured creditor. There is a restriction up to a maximum individual employee claim of $2,000. This was deal with last week. Then the secured creditor is not entitled to realize unless he has filed a prof of security with the trustee and the trustee admits the security interest and the trustee does not exercise his power to redeem the security interest and that the court does not postpone the right of that security creditor to realize or otherwise deal with the property. Now where the trustee does not have knowledge of a debt and proceeds to pay dividends, and if after he has paid the final dividend a creditor suddenly appears, the debtor is then liable to the creditor for the amount he would otherwise have received had the trustee had knowledge of the debt. It is interesting also to note that the status of the bankruptcy is not revived for this liability, and it is also interesting to note that the creditor must prove that in fact he did not have knowledge that there was a bankruptcy proceeding. The creditor must prove this in order to qualify for the payment of the debt, but the liability is on the debtor to make a subsequent payment to meet that liability to that creditor.

Senator Flynn: You mean they have done away with the obligation for the creditor to prove that he was not aware of these bankruptcies?

Mr. Zwaig: That is right. The creditor must prove that he was not aware of the bankruptcy. That is right.

Senator Flynn: That is what is in the present legislation. The dividend is payable to a creditor who was not aware of the bankruptcy; that is, the same dividend he would have received if he had filed a claim.

Mr. Zwaig: If the creditor has notification prior to payment of the final dividend, he still ranks.

Senator Flynn: He can take the dividend out of the assets available.

Mr. Zwaig: But if it is after the dividend, I understand he has no recourse for recovery.

Mr. Baird: Section 148(1)(*f*) of the old act provides as follows—

Senator Flynn:

> (*f*) liability for the dividend that a creditor would have been entitled to receive on any provable claim not disclosed to the trustee, unless such creditor had notice or knowledge of the bankruptcy and failed to take reasonable action to prove his claim;

Senator Cook: The new law, section 3, says that subsection 1 does not apply where the creditor had knowledge of the bankruptcy.

Senator Flynn: It is the same thing.

Senator Cook: And the onus of proof is on him under section 4.

Mr. Zwaig: That is right. The bill continues to recognize the right of set-off where two persons have amounts owing one to the other and an arrangement or a bankruptcy order is made.

This section provides an exception by stating that where there is a transfer within three months of the filing of the proposal or a bankruptcy, and the person to whom the transfer was made had knowledge or reason to believe that the debtor was insolvent or was unable to pay his debts, then no right of set-off can be claimed. In addition, no right of set-off can be maintained in any circumstances in respect of a debt arising out of a transfer made within ten days of the filing of the proposal or the bankruptcy.

The next topic of discussion is "Conflict of Interest", and what the bill proposes to do is to codify the conflicts of interest that may exist between parties who are entitled to act as accountants, solicitors, or subsequently trustees of a bankrupt estate. These are provided for in section 4 (a), (b) and (c).

No person can act as a trustee where, within two years, he has been a director or officer, or has had a professional relationship with a debtor. This is in accord with the existing provincial regulations of the various provincial Institutes of Chartered Accountants.

The trustee in bankruptcy cannot act, or cannot assist, in the realization of a secured creditor's assets. Also, the trustee, or interim receiver, where he is using professional assistance, be it a solicitor, valuator or accountant, during the course of his administration, must obtain a certificate from that particular professional, in writing, to the effect that there is no conflict of interest.

Section 40(4) says:

> 40(4) Where an interim receiver or a trustee
>
> (a) acts in contravention of section 28, 29 or 30, or
>
> (b) retains the services of a solicitor, an accountant, a valuator or an auctioneer in contravention of subsection 31(1),
>
> the fees otherwise payable to the interim receiver or trustee may be reduced or forfeited on taxation.

Section 40(5) goes on to say:

> 40(5) Where a solicitor or an accountant has given a statement in writing pursuant to subsection 31(2) that he knows to be false, the fees of the solicitor or accountant may be reduced or forfeited on taxation.

Senator Walker: That is a pretty light penalty, is it not, for fraud?

Mr. Zwaig: Section 40(5) I am in full accord with. I am looking back at section 40(4), because the instance may arise where a conflict of interest comes up subsequent to an appointment, and I think you are leaving it in the hands of your bankruptcy administrator to reduce the fees, or

forfeit fees, on taxation; yet the administration of the file may be perfectly in order, with the exception of this one consideration. In other words, what happens to the trustee who has realized in fact the maximum possible on the estate? Perhaps subsection (4) can be dealt with in such a way that if a conflict subsequently arises, the trustee may continue with the concurrence of the inspectors, and go to court for direction.

Mr. Baird: Determing what to do if there has been a conflict of interest in clearly a judicial function, and what should the penalty be? I do not think that type of function should be delegated to the administrator. That should be left to the court.

Senator Laird: Absolutely.

Senator Walker: It seems to me that with regard to section 40(5), on the face of it, it is shocking that a solicitor who has given a statement that he knows to be false is liable only to a penalty of having his fees reduced. He could be disbarred for that. Why would you let him off with such a small penalty?

The Chairman: That would be a matter for the law society.

Senator Flynn: He could still be disbarred, if it is in the code of ethics. Because the law says that he only loses his fees does not mean that he could not be disbarred.

The Chairman: That is all that this bill provides, but there are other areas that provide other penalties.

Senator Walker: But it goes on to say that his fees may be reduced for fraud.

Senator Laird: And guess by whom? The administrator.

Mr. Zwaig: Section 40(5) is a very serious offence on the part of professionals, and I am not querying that at all. I am seeking, perhaps, to modify the wording of section 40(4) to envisage a situation where the trustee in bankruptcy is trying to sell the business as a whole unit, and there is an asset that is subject to moneys due to a secured creditor. It appears that there might be a duplication of fees if secured creditors have to appoint their own trustees to realize or assist in the realization of those assets.

Perhaps with the concurrence of the inspector and perhaps with the permission of the court, the trustee in bankruptcy can act for both parties and not face the penalty of having his fees reduced or forfeited.

Senator Macnaughton: So that there is some leeway.

Mr. Baird: This is going to be a controversial area, this issue of prohibiting the trustee in bankruptcy from acting for secured creditors. At the present time it is common for a trustee in bankruptcy to act as an agent for a bank and realize the security and also for the trustee in bankruptcy to act for ordinary creditors. When one person is performing the two functions there is no duplication of effort and the cost is reduced. The trustee usually goes outside and gets an independent legal opinion on the validity of the claim of secured creditors and carries on. It has this practical benefit that the assets can be put up for sale in bulk, the tenders come in and will be submitted to the inspectors for their approval and there will be very little duplication of effort and cost. Clause 30 is a prohibition against the trustee acting for secured creditors clearly will increase the cost of administration.

Senator Cook: If you look at section 45, it refers only to the solicitor of the company. Section 31(1) refers to a solicitor, accountant, an auctioneer, valuator or other person. Why then tax only the fees of the accountant and the solicitor?

Mr. Baird: I think this is because these are the only fees that are being taxed by the administrator.

Senator Cook: Why not put the others in and say that they would come under the same form of taxation or otherwise? In other words, the other man should be stuck in too, the valuator or the auctioneer or other person.

Mr. Baird: Probably the auctioneer has got his money and the right of recovery would be a problem. It may be that they do not make any attempt to recover them.

Mr. Zwaig: Perhaps auctioneers and valuators should have their accounts taxed as well.

Senator Laird: Senator Cook, we certainly want to get away from giving to any administrator the right to tax any legal cost or any other kind of costs of this kind.

The Chairman: The registrar is a professional authority under the present act.

Mr. Baird: That is correct.

Senator Walker: That worked out pretty well.

The Chairman: Would this be a convenient place to stop?

Mr. Zwaig: Yes. The next section is a rather long one.

The Chairman: I think we have had considerable coverage this morning of the various headings. If you are inclined to do some reading—which I expect all of you are doing—you certainly have the material and handy references.

The committee adjourned.

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FIRST SESSION—THIRTIETH PARLIAMENT

1974-75

THE SENATE OF CANADA

PROCEEDINGS OF THE

STANDING SENATE COMMITTEE ON

BANKING, TRADE AND COMMERCE

The Honourable SALTER A. HAYDEN, *Chairman*

Issue No. 46

THURSDAY, JUNE 26, 1975

Fourth Proceedings on:

"The *Subject-Matter* of Bill C-60, Bankruptcy Act, 1975"

(Witnesses: See Minutes of Proceedings)

29410—1

THE STANDING SENATE COMMITTEE ON BANKING, TRADE AND COMMERCE

The Honourable Salter A. Hayden, *Chairman*

The Honourable Senators:

Barrow	Hays
Beaubien	Laird
Buckwold	Lang
Connolly (*Ottawa West*)	Macdonald (*Cape Breton*)
Cook	Macnaughton
Desruisseaux	McIlraith
Everett	Molson
*Flynn	*Perrault
Gélinas	Sullivan
Haig	Walker—(19)
Hayden	

**Ex officio* members

(Quorum 5)

Order of Reference

Extract from the Minutes of the Proceedings of the Senate, May 13, 1975.

"The Honourable Senator Hayden moved, seconded by the Honourable Senator Bourget, P.C.:

That the Standing Senate Committee on Banking, Trade and Commerce be authorized to examine and report upon the subject-matter of the Bill C-60, intituled: "An Act respecting bankruptcy and insolvency", in advance of the said Bill coming before the Senate, or any matter relating thereto; and

That the Committee have power to engage the services of such counsel, staff and technical advisers as may be necessary for the purpose of the said examination.

After debate, and—
The question being put on the motion, it was—
Resolved in the affirmative."

Robert Fortier,
Clerk of the Senate.

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Minutes of Proceedings

Thursday, June 26, 1975.
(61)

Pursuant to adjournment and notice the Standing Senate Committee on Banking, Trade & Commerce met this day at 9:30 a.m.

SUBJECT: Bill C-60—Bankruptcy Act, 1975.

Present: The Honourable Senators Hayden, (*Chairman*), Barrow, Beaubien, Connolly, (*Ottawa West*), Desruisseaux, Flynn, Hays, Laird, Lang, Macdonald, (*Cape Breton*) and Walker. (11)

In Attendance: Mr. David E. Baird and Mr. Melvin C. Zwaig, Advisers to the Committee.

Mr. Baird explained to the Committee certain aspects of Bill C-60 respecting security properties in the possession of stock brokers and investment dealers and related problem areas; following which the Committee heard the following brief:

Joint Submission of Montreal, Toronto and Vancouver Stock Exchanges *and* the Investment Dealers Association of Canada.

represented by the following witnesses:

Mr. J. R. Kimber, Q.C., President, The Toronto Stock Exchange;

Mr. A. G. Kniewasser, President, Investment Dealers Association of Canada;

Mr. M. Bélanger, President, Montreal Stock Exchange;

Mr. E. S. Miles, Chairman of the Board, The Toronto Stock Exchange;

Mr. E. G. Cleather, Chairman, Finance Administrators Section, Investment Dealers Association of Canada;

Mr. D. I. Richardson, The Clarkson Company;

Mr. J. D. A. Jackson, Blake, Cassels & Graydon; and

Mr. H. P. Branchaud, Regional Director, Investment Dealers Association of Canada.

At 11:20 a.m. the Committee proceeded to the next order of business.

ATTEST:

Frank A. Jackson,
Clerk of the Committee.

The Standing Senate Committee on Banking, Trade and Commerce

Evidence

Ottawa, Thursday, June 26, 1975

The Standing Senate Committee on Banking, Trade and Commerce met this day at 9.30 a.m. to consider the matter of Bill C-60, respecting bankruptcy and insolvency.

Senator Salter A. Hayden (*Chairman*) in the Chair.

The Chairman: Honourable senators, this morning we will commence by having Mr. Baird, one of our advisers, deal with the provisions in the bill relating to the treatment of stockbrokers and customers. That will not take too long, but whatever length of time it takes will be important. We will then hear the submissions. You have a copy of the brief on behalf of the Exchanges and the Investment Dealers Association of Canada. I thought you would be better able to deal with these people after we had concluded dealing with the position of stockbrokers and customers under the bill. Mr. Baird, will you start?

Mr. David E. Baird, Adviser to the Committee: Mr. Chairman, honourable senators: There are no provisions of the present Bankruptcy Act dealing with stockbrokers. The present law, under section 47 of the Bankruptcy Act, is that:

> The property of a bankrupt divisible among his creditors shall not comprise
>
> (a) property held by the bankrupt in trust for any other person.

The courts have held that securities lodged with a stockbroker, eventually either to be held in safe keeping or to be sold, are held in trust by the broker for the customer. As a result, they do not form part of the assets of the bankrupt estate; the trustee in bankruptcy does not have the right to deal with them as he would any other assets of the bankrupt, and the Bankruptcy Act gives no guidance as to what a trustee in bankruptcy can do. As a result, when there have been stockbroker-investment dealer bankruptcies the trustee has been required to apply to the court for directions. The court has then given guidelines to the trustee on what he should do with securities in his possession.

The major problem that has arisen is the situation where there are insufficient securities on hand to satisfy the claims of the customers; customers are claiming more securities than in fact the trustee in bankruptcy has. This has arisen in some cases as a result of securities being pledged to a bank for personal or business borrowings by the stockbroker, and the bank selling the customers' securities and returning a balance, if any, to the trustee in bankruptcy.

The bank, which is unaware of the true ownership of the share certificates or securities, is legally entitled to sell them to satisfy the indebtedness of the stockbroker, because the securities, when they are pledged to the bank, are in "street form," which means they have been endorsed by the registered owner, and the bank is not subject to breach of trust unless it had knowledge of the fact that the shares were held in trust. The general rule which the cases have established to date, when the trustee in bankruptcy applies to the court for directions, is that the claimant to trust property in the possession of the trustee must be able to identify the property claimed. The major issues that the courts have gone into in the cases is to what extent or to what effect must the rules of identity apply: how can the customer trace his security, what evidence must he show in order to claim the return of that specific security?

The other general rule the courts have applied, in cases dealing with stockbroker bankruptcies, is the principle of sharing the burden of the loss. This has been described as a situation where securities belonging to different customers are pledged by the broker as security for a loan and some are sold by the pledgee to satisfy the loan whereas others which are not needed for that purpose are not sold. It has been held that the owners of the securities which have not been sold must contribute pro rata to the loss of the securities which have been sold. This means that even if securities which, according to the books of the stockbroker belong to A, are returned by the bank to the trustee in bankruptcy, A is required to share any loss suffered by B, because both A's securities and B's securities were given to the bank, the bank sold B's securities and returned A's securities to the trustee in bankruptcy.

The Chairman: In that case, I understand that the banks get a written authority, at the time they make the loan, from the people to whom they are lending, that they may do this.

Mr. Baird: It does not go quite that far. The customer has endorsed the security and gives it to his broker. He usually does not go any further than that. If it is a margin account, he provides them with a margin agreement which permits the broker to pledge the securities to the bank.

The Chairman: Yes.

Mr. Baird: The problem which has arisen in the past is the situation where the amount that the broker borrows against the securities exceeds the amount that the customer owes to the broker.

The Chairman: The bank is dealing only with the broker.

Mr. Baird: Yes. The court in the case of *Re Waite, Reid and Company Limited,* the decision of the Master Rose in Ontario, which was confirmed by Mr. Justice Houlden of the Supreme Court of Ontario, gave three specific guidelines to a trustee in bankruptcy concerning

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the right of identification. The court in that case held that:

> Where securities were held by the bankrupt in safekeeping for a customer, and to which were appended a certificate setting out the customer's name, the securities were to be handed over by the trustee together with any dividend or interest paid thereon, subject to the customer paying any debt due by him to the bankrupt.

This is the case where there was specific identification, the securities were held by the trustee, and the customer got the securities back.

In that case it was also held that where the bank returned securities for which the customer could produce satisfactory proof, that the securities returned by the bank were in fact the securities handed to the bankrupt by the customer as a pledge or security for his marginal account, the customer was entitled to the return of these securities.

This means that the customer had to show that that specific certificate was given to the broker, and if that specific security was returned the customer was entitled to it.

Senator Beaubien: Mr. Baird, in that case only the broker was the bankrupt? The broker?

Mr. Baird: Yes, that is correct.

The Chairman: We are still talking about the present law.

Senator Beaubien: What the law is now?

Mr. Baird: We are talking about what the law is now, up to the present time. I think you have to realize the problems in the present law before you can ascertain what effect the new law would have.

Senator Beaubien: The practice today would be that if a person is borrowing from a broker he has given his securities, and endorsed them and the broker would have one in his own name, which we call "the street name" and therefore you could not identify the same thing.

Mr. Baird: That is correct, you could not.

The Chairman: There is a possibility?

Senator Beaubien: If you put in 100 shares of Bell Telephone and the broker has put up 100 shares in general borrowing, you could perhaps identify them.

Mr. Baird: Yes. The courts have permitted identification in that fashion by class of security. If you are the only claimant to 100 shares of securities of Bell Telephone and there is only 100 shares there.

Senator Beaubien: They are identified.

Mr. Baird: The courts have permitted that kind of identification.

Senator Beaubien: It would seem to me that it would be terribly unjust that one man, simply because you can identify his security, gets them back, whereas others could not. The cases are identical.

Mr. Baird: That is the principle of sharing the burden of the loss. That is why they have introduced that principle. They felt it was inequitable that if shares of Bell Telephone owned by two persons had been pledged to the bank—if you have 100 shares in Bell Telephone pledged to the bank and I have 100 shares of Bell Telephone pledged to the bank and mine are sold and yours are not, the principle of sharing the burden of the loan is that you have to give me 50 of your shares.

Senator Laird: Yes, but supposing it was definitely identifiable in some fashion or other.

Mr. Baird: The court in the *Re Waite, Reid* case said that if you can identify that specific security, that specific certificate, if it had not changed, if it had not been converted into the name of the broker, they modified the principle of sharing the burden of loss and said if you could trace the specific certificate right through, then you got it back.

Senator Laird: But supposing it was in the street form, but you knew the certificate number and all that sort of thing, that would make it identifiable?

Mr. Baird: In the *Re Waite, Reid* case it came back to the customer. There was no sharing of the burden of the loss in that situation.

Senator Connolly: When was that case decided?

Mr. Baird: In 1969. It was reported on February 10, 1969.

The problem of identification has been extended. You have the question of tracing by specific number of share certificate. Then you have the problem of tracing by class. If you are the only claimant to that particular number of shares, it has been held that you are entitled to the shares.

What you can see is a morass of legal problems arising out of questions of identification and tracing.

Senator Connolly: You have always had that, have you not? It has always been a problem?

Mr. Baird: That is correct. This goes back to the *Stobie Forlong* situation.

Senator Hays: In 1930.

Mr. Baird: Yes, concerning the stockbrokers in the 1930s.

The Chairman: Senator Connolly, what we are doing is giving you information in relation to what the present law is...

Senator Beaubien: A bird's eye view.

The Chairman: —so that you may get a better understanding of what the bill does.

Mr. Baird: Honourable senators, these are the major problems arising at the present time out of security stockbroker bankruptcies. The fact that there are no guidelines, the courts have laid down the guidelines, but the trustee in bankruptcy cannot act, will not act because he wants to be protected by order of the court. As a result he has to go to the court, the hearings are time-consuming, the customer does not get his security re-

turned or even a portion of them, for a considerable length of time. I think the new bill attempts to solve these problems. Whether it has created new ones is another question.

The Chairman: We will see that in a moment.

Mr. Baird: I would like now to refer to the provisions of Bill C-60. The first clause and the most crucial and significant one is clause 313, which is on page 154 of the new bill. It provides that the property of a customer which is in possession of a stockbroker, as well as the property of a stockbroker, vests in the trustee in bankruptcy. This is a very important proposed change in the law because it takes a third party's asset such as securities which he leaves with the broker, and vests the legal title to those assets in the trustee in bankruptcy. It goes as far as covering securities which may be lodged with the stockbroker in safekeeping even if the customer has not endorsed the certificate.

As you will see in clause 315, the trustee is given the power to endorse securities registered in the name of the customer. If the customer loses his securities as a result of this clause, he is considered to be a creditor in the bankruptcy. "Customer" is defined in clause 309 of the new bill to include basically anyone who deals with the broker except a person who has a claim arising out of property that is part of the capital of the stockbroker or subordinated to the claims of the creditors of the stockbroker. This is intended to remove from the definition of "customer" and insider who has subordinated his securities to the claims of creditors of the stockbroker. You will see the definition of "customer" at page 153, in clause 309. You will note that by excluding the person who subordinated his securities from the definition of "customer," his securities are also excluded from the effect of clause 313, so that the assets of the insider who subordinated his securities to the claims of creditors do not vest in the trustee in bankruptcy under the proposed bill.

I do not think they intended it that way, but that is the way it comes out. As a result, his assets will not be available to form part of the customers' fund, because they do not vest in the trustee in bankruptcy.

After you have all the assets of the customer in the possession of the trustee, vesting in the trustee, together with the other assets of the stockbroker, there are two funds created. These funds are created by the provisions of clause 316, subclause (1), at page 154. The first fund consists of money and securities in the possession of the stockbroker, and, for convenience, I call that the "customers' fund." If you are prepared to accept the principles of the new bill, it is my submission that the customers' fund should be enlarged, because, as you will see under clause 316, the customers' fund consists "of the money and securities that vest in him under that section."

Now, you have money that vests in the trustee and securities that vest in the trustee. It is my interpretation that money would not include funds on deposit with the bank because that, in law, that would be money owing to the stockbroker, and, therefore, is not money as such but rather a debt owing to the broker. Similarly, money such as accounts receivable owing to the stockbroker, in my opinion, would not come into the category of money or securities, and as a result would not form part of the customers' fund. There is a question of legal interpretation of the word "securities," but I do not think it can cover an account receivable. If you are going to have a customers' fund, and that is a question for this committee to decide, the fund should be enlarged to cover funds on deposit and accounts receivable.

The new bill in clause 316, sibclause (2), provides that each fund, the customers' fund and the general fund, should bear pro rata the debts incurred by the trustee or interim receiver carrying on the business of the bankrupt, and the costs of administration and other preferred claims. These other preferred claims are claims of a wage earner or the claims of the government. So each fund bears pro rata those costs. After that the customers' fund is available to satisfy the claims of customers, except deferred and related customers, and then after that related customers. The balance of the general fund is available to satisfy any remaining claims of customers and ordinary creditors ratably. That means the ordinary creditors and the customers share ratably in the general fund. After that, if there is anything left, the related customers' claims are satisfied.

Below that there are the deferred customers. The chances of a deferred customer ever getting paid are nil, because first the customers have to be satisfied and then all ordinary claims have to be satisfied. It is hardly realistic to expect that a deferred customer would ever get paid. But he should not be entitled to be paid anyway, because he is defined as a person who caused or materially contributed to the insolvency of the stockbroker.

The Chairman: So that is a penalty.

Mr. Baird: Yes, you could say that is a penalty. His claim is at the very bottom.

The definition of "related customer" is found at page 155, in clause 316(5). This should be considered quite closely, because this clause provides that a related customer is a person who is not a deferred customer but is one who owns more than 5 per cent of the assets of the broker, or owns or exercises control or direction over more than 5 per cent of the shares of the stockbroker or corporation, or who is related to the stockbroker or person described above.

"Related" is a legal, technical term under the new bill, and is set out in clause 9. Basically, it means a person who has legal control over a corporation, or, with respect to individuals, it is a person who is related by marriage or related by blood relationship in a direct line, which would be a father or son, or a collateral line, which are brothers and sisters. These are the people who are deemed to be related within the provisions of the new bill.

Clause 317 of the new bill provides that all securities are valued as of the close of business on the date of bankruptcy. This has been the practice established by the court and it is desirable to have that included in the Bankruptcy Act.

Clause 318, at page 156, provides that within 20 days of the date of bankruptcy the trustee may satisfy all or part of the claim of a customer by delivery of securities to which that customer was entitled at the date of the bankrutpcy—even if there has been change in their value after the date of bankruptcy.

This clause sounds rather good, but the problem with it is that if there is a shortfall and some customers will not be paid in full, the clause does not make it clear whether it will give the trustee in bankruptcy the right to satisfy one customer's claim 100 per cent, by delivery of his securities, while leaving the other customers who do not get delivery just a pro rata share in the customers' fund. It does not say whether the trustee can do that. It does not indicate whether the trustee can make that inequitable distribution or decision affecting the rights of various customers. If you were to read it literally you would think the trustee does have the privilege of treating one customer differently from another and of giving to one customer a larger share of return on his claim than another receives.

Senator Connolly: If identification is possible, surely the customer is entitled to take the shares that are pledged, the certificates that are pledged?

Mr. Baird: The proposed bill wipes out the concept of identification and prohibits any delivery on the basis of identification. Then we step back and say that a trustee may deliver, and clearly there must be identification in order to have the trustee decide how that customer is entitled to that particular security; so they start out at section 313 by abolishing the concept of identification, and bring it back in section 318.

Senator Beaubien: I am a little confused. In the old days a stockbroker was not able to pledge securities on which his client had not borrowed. In other words, if I went to a broker and gave him some securities to have him transfer two or three lots, to be put into one certificate, and that sort of thing, the stockbroker was not allowed to borrow against them. Those securities would not form part of any fund.

Mr. Baird: Under the new act they would now form part of the customers' fund. You would not be entitled to the return of those securities. It would not matter for what purpose you delivered the securities to the broker. If they were in his possession at the date of bankruptcy, you would not be entitled to the return of the securities, but rather you would be a creditor and have a claim against a customers' fund. That is the effect of section 313.

Senator Flynn: Even if they remained registered in the name of the client?

Mr. Baird: That is correct.

Senator Beaubien: Not if they were in the name of the client. The broker could not use them again.

Mr. Baird: Under the new bill, he can. That is how radical the provisions of the new bill are.

Senator Beaubien: But that is terribly unjust. If you go to a broker and simply give him some securities to do something for you, and you are not borrowing any money and are not in any way implicated in his affairs—he is doing a service for you, and that is all—your securities should not be thrown into the pot if he goes insolvent.

Senator Connolly: Of course not. How are the identification rules working now?

Mr. Baird: The identification rules have been modified: they have not required strict identification; they have permitted identification by class. If there are claimants to 500 shares of Bell Telephone, and there are 500 shares of Bell Telephone on hand, those would be delivered to the clients.

Senator Connolly: Yes, you said that a moment ago. Generally speaking, however, are the rules for identification satisfactory at the present time?

Mr. Baird: They are satisfactory, but they take a long time to work out because of the problem of having to go to the courts for directions and also because of the procedure. The rules are producing equity, but they are taking a considerable amount of time to produce that equity. If the rules were codified and put into the provisions of the new bill, or the old bill, the trustee would then have guidelines to follow, and he could produce, distribute and dispose of certificates in possession of the stockbroker much more quickly. This is what the major problem is: it is not the end result that is the problem; the problem is the delay in achieving that result. Somehow we must come up with a faster procedure than we have at the present time.

Senator Connolly: In a case such as the example mentioned by Senator Beaubien, where a certificate is actually registered in a client's name, it should be very simple to write a rule which says that that property does not belong to the broker, and that it should be returned to the client.

Mr. Baird: If you put that rule in the Bankrupty Act, the trustee, within seven days, would be in a position to return that certificate to the customer.

Senator Flynn: Under the present act he can do that very easily.

Mr. Baird: He can do it, but he does not.

Senator Flynn: Why?

Mr. Baird: Because there are no rules laid down. He has to go to the courts to get instructions, and this is what takes so long.

Senator Connolly: That is to protect himself.

Mr. Baird: Yes.

Senator Flynn: If it is clear that it belongs to the claimant—

Senator Connolly: Or the customer—

Senator Flynn: —he could use section 50. Was it section 50?

Mr. Baird: Yes. You use section 59, actually. It is the old section 50. But you have the problem of this theory of sharing the burden of the loss coming into play, this concept that if two securities were pledged to the bank by the broker, even though he pledged them improperly, and the bank then realized on one security and returned the other security to the broker, should the trustee in bankruptcy give that security back to the customer, or should he divide the security up between the customer who claims the security and the customer who suffers the loss.

Senator Flynn: When they were given to the bank as security they lost their identification.

Mr. Baird: Well, they might not have.

Senator Flynn: Certainly they were not registered. If you take a bunch of bonds and give them to the bank as security, then of course there is confusion of the estate of the stock broker and of the customer.

Senator Connolly. There is misfeasance, too, because it is an improper use.

Senator Flynn: Of course. This has always been the rule.

Senator Connolly: It is not too hard to rectify that situation, or to make a rule to govern such a situation.

Mr. Baird: No, rules could be worked out. We have rules in the established cases, and if they could be incorporated into the provisions of the new bill, the trustee could distribute and return securities much more expeditiously.

Senator Flynn: I did not read that part of your notes yet. Do you suggest that the new bill would treat a stockbroker differently from any other person who might be holding property in trust?

Mr. Baird: Yes.

Senator Flynn: It does not deal with trust companies, for instance, or other persons—even lawyers or notaries?

Mr. Baird: No, these provisions, basically, only apply to stockbrokers. The concept that the property of a customer which is not the property of the stockbroker could, because it is in the possession of the stockbroker, automatically be transferred to and vest in the trustee in bankruptcy, in this bill, is limited to the situation of a stockbroker; it does not apply to a lawyer who holds assets in trust for his client, or to a trust company, or to a bank, or anyone else.

Senator Flynn: The same rules would govern the other persons?

Mr. Baird: Yes. The existing rules would govern the other persons, and assets which are not the property of the debtor would not vest in the trustee in bankruptcy.

Senator Flynn: Have you any idea of the reason behind that special treatment for stockbrokers?

Mr. Baird: I think it is the length of time involved in sorting out the affairs of a stockbroker. It is to avoid this length of time, this cumbersome application to a court, which takes maybe a year or a year and a half to resolve. This is the reason why they have incorporated these provisions in the stockbroker bankruptcies, to provide a very simple solution to the problem.

Senator Laird: Mr. Baird, do you say the language used is permissive—that is, "may"?

Mr. Baird: Yes.

Senator Laird: All right. Is there anything, for example, in the bill, that would prevent the trustee from returning the security to one person at an increase in value because of a rise in price, and another security to another individual which might have fallen in price? The whole deal is permissive. What protection is there against some inconsistency there as between customers?

Mr. Baird: You have hit the nail right on the head. This is the problem of unfair treatment of one customer as against the other. There is no restriction on the trustee's exercise of discretion in the new bill. It is possible to go to court and apply to the court to have the trustee's decision overruled, but the bill itself does not provide any guidelines or principles under which the trustee should act.

The Chairman: This may involve a revision of clause 313, and particularly the words:

> Where a bankruptcy order is made in respect of a stockbroker, the property of the stockbroker and the property of each customer that is in the possession of the stockbroker vests in the trustee.

Where you are going to have to attack this thing is right there.

Mr. Baird: That would be the section you would amend or change, because that is the section that takes the client's or customer's securities that are given for the purposes of transfer and vests them in the trustee in bankruptcy. Section 313 is the operative section.

Senator Connolly: Section 313 as it runs now, in the light of these explanations, overrides a contractual arrangement made previous to the bankruptcy.

Mr. Baird: It overrides a contractual arrangement such as a bailment which means delivery for a purpose without any intention of transferring title. It also overrides the concept of trust that has been developed in the law.

The Chairman: Are there any further questions or can we move on to the submissions now?

We have here today the representatives of the Montreal, Toronto and Vancouver Stock Exchanges, and we also have representatives of the Investment Dealers Association of Canada.

Mr. Kimber, are you going to start off the proceedings?

Mr. J. R. Kimber, Q.C., President, The Toronto Stock Exchange: If I may, Mr. Chairman.

The Chairman: Then there is Mr. A. G. Kniewasser, President, Investment Dealers Association of Canada; Mr. M. Belanger, President, Montreal Stock Exchange; Mr. E. S. Miles, Chairman of the Board, The Toronto Stock Exchange. Then we have Mr. E. G. Cleather, Chairman, Finance Administrators Section, Investment Dealers Association of Canada; Mr. D. I. Richardson, The Clarkson Company; and Mr. J. D. A. Jackson, of Blake, Cassels & Graydon.

Mr. Kimber, we have your brief, and you may discover as you proceed that some of the comments we have to make would indicate that we have done some study of your brief.

Mr. Kimber: I am sure you have, Mr. Chairman.

First of all we were helped by Mr. Baird's very full explanation of the existing law and the proposed bill. As usual he has done an excellent job.

Mr. Chairman, gentlemen, I shall be making some references to the brief and we have filed some additional copies with the secretary.

We state in the brief that we are, of course, very pleased to have this opportunity to appear before you. Bill C-60 has great ramifications for the securities industry. I think you have already appreciated that judging by Mr. Baird's explanation. Our comments on the bill are limited to Part VII, which is the part directed specifically to the securities industry. In our view the government in doing so has made a wise decision in dealing with the situations in one specific part of the bill. It is a clear recognition of the important role the securities industry has in our economy and of the great responsibility that members of the industry have to their clients. Leading economists and academics have no hesitation in claiming that ours is one of the most mature capital markets in the world, ranking behind only the United States and the United Kingdom. It is a capital market which deserves special attention.

I should point out that the reason for government interest in the bankruptcy of securities firms is not based on any history of losses by the public due to the insolvency of members of the industry. As president of the Toronto Stock Exchange I am pleased to say that no member of the public has suffered any such loss in dealing with one of our members for as long as one can remember. The other presidents here today can make a statement at least as extensive as that.

Prior to the report of the Study Committee on Bankruptcy and Insolvency Legislation, 1970, the Canadian securities industry had directed its mind to the problems created by bankruptcies of securities firms, and had established the National Contingency Fund. Contrary to what took place in the United States, the industry in Canada did not seek any government financial assistance in the creation of the fund. However, we did discuss with the department the unnecessary costs incurred in winding up securities firms bankruptcies as well as the inequities in the present law.

The 1970 report suggested a separate and uniform code for the administration of bankruptcies of securities firms, principally for costs and administrative reasons, the very points that Mr. Baird makes. It is interesting to note that the report recommendation is not dissimilar to the amended structure which we have proposed in our brief.

Since the report we have had further discussions with officials of the Department of Consumer and Corporate Affairs. They have obviously given considerable thought to the situation and have come forth with a proposal which accomplishes much of what the industry desires. In our brief we comment on the co-operation of the department with the industry, and I wish to point out that that is not said merely as a matter of politeness. The department has demonstrated in the bill a great awareness of the problems and has obviously listened carefully to our comments. While we have strong reservations on one aspect of the bill, other aspects of it are most practical and are in the public interest.

Senator Laird: You are only talking about Part VIII now?

Mr. Kimber: That is right.

Senator Laird: Because we may have some comments on other parts as well.

Mr. Kimber: Some of us may be here another day to deal with other parts.

We have discussed our reservation and the proposed changes in our brief with officials of the department. It is our impression that they have no serious objection to our proposals subject to more consideration of the wording of the suggested amendments. We have also discussed the bill with the Ontario Securities Commission, and I am pleased to be able to report to you that the Commission fully supports the position we are taking in our brief.

In our brief we comment on the differences between the operation of securities firms and most other businesses. Securities firms deal with highly liquid assets, the prices of which are subject to frequent and rapid movement. A speedy and efficient settling of the accounts of clients is highly desirable.

A major benefit which arises from the proposals in the bill is the treatment of clients as a different type of claimant from the ordinary trade creditor. The bill, as Mr. Baird pointed out, establishes two pools of assets, one consisting of money and securities assets, and the other consisting of non-securities assets. The details of these two pools and the priorities attaching to them are set out on page 6 of our brief. They are easier to follow on that page than they are in the bill itself.

Part of the securities assets are securities held by securities firms in trust for clients. They also hold securities of clients which are deposted with them for the purpose of financing loans to clients. In addition, they hold securities for clients in order to complete trades made on their behalf. The sums involved are substantial. I estimate that members of the Toronto Stock Exchange, at any given moment, hold about $1.5 billion worth of securities in safekeeping alone.

Our brief is primarily directed towards the treatment of safekeeping securities in the bill. While we are pleased that the bill treats clients differently from ordinary creditors, we believe that it fails to recognize the importance of the safekeeping function.

Our specific proposals are set forth on page 7 of our brief. Of the four points set forward, number one is by far the most important. That proposal is that specific provisions should be included to apply to securities (a) held by securities firms in safekeeping or segregation or (b) placed by securities firms in securities depositories.

Senator Connolly: What do you mean by "safekeeping or segregation"?

Mr. Kimber: Well, there are different practices in the industry, senator. The way the words are used here tries to draw a distinction between securities which are in what is called "pooled" safekeeping and those which are specifically segregated by individual certificates relating to individual clients. The practice has developed in the industry, with the age of computers, that there is a bulk safekeeping procedure adopted. They are the same thing in so far as the law is concerned. They are both trustee securities but, because of the different usages in the industry, we have used both words. Legally there is no distinction between the two groups. Under the

present law, such securities would be deemed not to be assets of the bankrupt and would be returned to the clients by the trustee in specie. The bill would vest these securities in the trustee and would form part of the securities asset pool.

We object to this proposal on a number of grounds. First of all, it is a very fundamental change in the law and is a change which applies only to stockbrokers. As is pointed out, a lawyer may be holding securities for clients; a trust company may be holding securities for clients. There could be a number of different situations.

Senator Connolly: And banks.

Mr. Kimber: A bank, yes, but in the stockbroker siuation the law has been changed so that the securities are no longer in that peculiar trustee, but vest in the trustee in bankruptcy and then are only part of the estate.

The Chairman: Do you object to there being a special part of this bill applying to stockbrokers and their customers?

Mr. Kimber: No, we agree that there are complications in the administration of estates of stockbrokers and a special part of the legislation should provide for that.

The Chairman: So it is only a question of how it has been done?

Mr. Kimber: Yes; we do not agree with the elimination of the basic law.

Senator Connolly: In you discussions with officials of the department, were you informed why it is desired to make this change in clause 313?

Mr. Kimber: As I understand it, the main purpose for the change is to eliminate some of the administrative difficulties that now arise. Mr. Baird went to some lengths to explain the complications of the trustee having to go to court. He has made a suggestion today which we would like to explore with him, that perhaps rules could be written into the legislation and therefore the trustee in bankruptcy could deal with these matters more expeditiously. That is a fruitful thought.

The Chairman: Mr. Kimber, someone once said, I forget where, that the elimination of the basic law is the beginning of bureaucracy. Would you care to comment on that?

Mr. Kimber: Being a former bureaucrat, I have to play both sides of the fence, Mr. Chairman.

The Chairman: I thought you might be able to recall for me who said that.

Mr. Kimber: No, I cannot.

Senator Connolly: You said it, Mr. Chairman.

The Chairman: I know.

Senator Lang: In 1920.

The Chairman: I made the most recent statement.

Mr. Kimber: So we object to that fundamental change in the law. We also object to this change because the bill causes a fundamental change in the relationship between securities firms and their clients. Clients find it a great convenience to leave securities with brokers. This has become more important in these days of complicated record keeping, which involves keeping track of capital gains, capital losses, dividends and so on, so it is a great convenience for clients to leave securities with brokers.

While in fact clients have run little risk in leaving securities with brokers, the change in the act has a damaging psychological effect in the relationship between brokers and clients. Already the significance of the bill is receiving public comment. I refer to a publication issued by Richard De Boo Limited, on May 15, at page 36, where the following comment is made:

> It would seem that a person would be foolish to leave with a broker securities which he owns free and clear, if the broker's bankruptcy in itself is sufficient to convert his ownership to only a claim, even though of some priority. This will cause quite a change in the stock brokerage field since many brokers now provide a service to their customers in collecting and recording dividends, recording capital gains and losses, and providing safekeeping for the securities themselves, which require to a greater or lesser degree that the securities be lodged with the broker.

Mr. Baird: Excuse me, Mr. Kimber, one of the major problems, I have seen, has to do with the question of physical identification, having to worry about the fact that they are in the safekeeping box or the cage and where the certificates are at that particular moment. As I understand the industry, the certificates might be out for registration, or somewhere else in the course of transit. Would it be sufficient if the trustee in bankruptcy were to return certificates which according to the records of the company were in safekeeping, if in fact somewhere in its possession it had those certificates?

Mr. Kimber: That is not very far from the suggestion we made here. In the proposal we make we have attempted to hit the same problem of unnecessary expense. In fact, we have said that those securities which, according to the records of the broker, should be in safekeeping and which are physically there, are returned to the client. There is no problem involved in that.

Senator Connolly: There again there would have to be a rule of identification, as Mr. Baird pointed out earlier.

Senator Beaubien: As I see it, Mr. Chairman, one thing is terribly important. Brokers handle securities in a great many instances for clients who sell one security and buy another, so that in parts of those transactions the securities being sold have been endorsed by the client, who has not received the other securities then made out in his name. Do you mean to say that under this legislation that client would be liable to lose everything if the broker became insolvent?

Mr. Kimber: Under the bill all securities are pooled. That pool is then available to meet all the claims of the security clients.

Senator Beaubien: What would be the position, then, under clause 313, of a client who sold 100 shares in Noranda and bought 100 shares in INCO?

Mr. Kimber: He would be at risk of not being paid in full, according to the law.

Mr. Baird: Would he also not be in risk under your suggestion, because that certificate would not be in fact held in safekeeping, or in segregation?

Senator Beaubien: No, it would have been sold and it could not be transferred.

Mr. Kimber: Under our suggestion there would always be a period of time during which securities would be in the administrative process of being transferred. We have said that we would be content to have those two, not the big pool of securities which are in safekeeping. The safekeeping securities might be 80 per cent of the securities, ones which are clearly designated. We suggest for ease of administration getting those securities out right away.

Senator Beaubien: Back to the owner?

Mr. Kimber: Yes. There is another class of securities, which are in the current box.

Mr. Baird: In transit would be an easier term.

Mr. Kimber: In order to meet the problem raised by Mr. Baird with respect to tracing and the sharing of the burden of loss, we would put those into the pool.

Senator Flynn: Even if they are on the way from the transfer agent and registered in the name of the customer?

Mr. Kimber: Yes; we would go that far.

Senator Connolly: Mr. Kimber, do you have to go that far? Is not the theory of bankruptcy that the assets of the bankrupt, and only those assets, are answerable to the bankrupt's debts? Now you have another class of securities, which you just latterly described, which are obviously not the property of the bankrupt. They are in a state of transition, being transferred, or being sold and other securities bought in their place, as Senator Beaubien has said, but they are not the property of the bankrupt and why should they be included in the assets of the bankrupt?

Senator Flynn: No, they are not.

Senator Connolly: They are brought in by this legislation.

Senator Flynn: But my understanding is that if the security can be identified, it goes, but they say that if it is in the process of being transferred it will go into the fund which will be distributed to the customers. But I do not see why you would have to do that. All right, I can understand that stockbrokers, when they get money for purchasing shares, they put it in a trust account, do they not?

Mr. Baird: No.

Senator Flynn: You do not have a trust account for the money you receive for clients?

Mr. Baird: No.

Senator Flynn: That would be the first thing to do, I would think.

Senator Connolly: Why should we not have it that way? Perhaps the law should be written in that way, so that money of that kind should be held in trust and identifiable as such. The books would have to reflect this.

The Chairman: The point is, we do not want to rush ahead of your administrative practices, Mr. Kimber, or interfere with them. We want to make this bill safe for customer and stockbroker and create the proper atmosphere in which they can work. If you start with the basic principle that anything that is not the property of the stockbroker, that is a good basic principle, is it not?

Mr. Kimber: Yes.

The Chairman: Then the trustee should not get his hands on that.

Mr. Kimber: We start at that point. I am not quarreling with you.

Senator Flynn: They should have a trust fund.

Senator Laird: Like the lawyers.

Senator Flynn: Certainly. Then you would not be able to identify the money, but it would be there to answer the claims of the customer whose securities or assets cannot be identified at that time.

Senator Connolly: To follow that up and to make it clear in my mind, if I transfer or release to you a share certificate for 100 shares of Bell Canada and say, "I want you to sell this and buy 150 shares of something else." Okay. Do I understand that the proceeds of that sale will be mixed with the broker's own assets and will not be held segregated by him in trust for me?

Mr. Kimber: That is correct. It will not be. Perhaps you would like to hear a comment from one of the brokers here who is actually involved in this type of operation.

Mr. E. S. Miles, Chairman of the Board, The Toronto Toronto Stock Exchange: That is absolutely correct. You need the funds in order to pay for securities coming in.

Senator Connolly: But you mix them with your own funds. Would it be a difficult thing to change your practice so that those funds would be segregated, or would it create more confusion?

Mr. Miles: I think it would create more confusion.

Mr. E. G. Cleather, Chairman, Finance Administrators Section, Investment Dealers Association of Canada: In effect, you have a situation of what we call a free credit balance. You have delivered the securities. That credit is yours. We owe it to you. There is a period of time before it is paid out where it is part of the cash of the firm.

Senator Laird: But they do that in the practice of law—segregate.

Senator Connolly: In that case a lawyer would have to put it through a trust account. He could not put it through the firm's books.

Mr. Kimber: That is right. It is quite a different operation.

Senator Connolly: I realize that. We are reluctant to make suggestions like this, but to clarify our own thinking about it, I think we should do so.

Mr. Kimber: A lawyer's accounts are a small part of his business operation. With regard to the broker's account, that is his operation, of getting money in and paying money out, of buying securities and selling securities. That is his operation. That is the type of business he runs. No one who has looked at the securities bankruptcies in the last few years has recommended that the clients' moneys be separated. That has not been the suggestion. They recognize the way the firms operate. They also recognize the very strict rules and the high capital requirements that the industry imposes upon its members.

Senator Connolly: That is another problem. As you were speaking, I wondered whether, in view of the ease with which your records are kept today, relatively speaking—with the computer and electronic devices—identification through that method might facilitate the solution to this problem.

Mr. Kimber: Senator, the cases which Mr. Baird spoke of—the *Waite, Reid* case, and the older bankruptcies—created more problems than we have had, in these situations, in the last few years. The record-keeping is now much better and the problems to a large extent have disappeared.

Mr. Richardson of the Clarkson Company is here and worked very closely with the industry in the few cases we have had in the last three or four years. He assures me, and he would assure you, that most of the problems that arose in the older cases have now been eliminated because of better record-keeping and better surveillance of the industry of its own members. All of our bodies have examiners going around constantly in the industry spot-checking the bookkeeping records, the securities accounts, and that type of thing, of the member firms. So the problem is whittling down.

The proposal in the bill to reduce costs is using a sledge-hammer to kill a mosquito. It is just too heavy a force to be brought into play to solve this problem. We have tried to go part way with the department. We recognize there are some administrative costs. We do start off at the same point which has been suggested here: that safekeeping securities are not the property of the broker and therefore should not fall into the hands of the trustee in bankruptcy.

Senator Connolly: We are with you there, quite strongly.

Senator Laird: We are with you.

Senator Flynn: The second step is natural—

The Chairman: When you say "should not fall into the hands of the trustee in bankruptcy," you mean he should not become legally possessed of them.

Mr. Kimber: That is right. Physically they come into his hands, of necessity, but legally they don't, they do not become the trustee's property to deal with. But this bill would vest all those securities in him.

The Chairman: You eliminate first from section 313 the language about the property in possession, to determine the right of the trustee to claim those securities. The first thing you eliminate is the safekeeping. They must be returned; they do not vest in the trustee. There may be securities that are in transit, out for transfer, or forming part of a course of transactions that is going on. To the extent that they can be identified, they should not vest in the trustee. There may be a little more of a problem regarding identification, but in many instances, by examining the broker's books and records as to what transactions are being carried on, you would find out whom they were being carried on for, and you would be able to identify a lot of those transactions.

Mr. Kimber: We have suggested, at the top of page 16:

> . . . securities of customers which are fully paid for and are held in the possession of the stockbroker in such a fashion as to enable such securities to be readily identified . . .

We hang to the thought that if the securities can be identified, then they go back to the customer.

Senator Flynn: A logical extension of your first proposal.

The Chairman: You gave an indication that you had discussed with the department sharing some of the cost of administration. How can you take a customer's securities and agree that they may be put into a customer's fund, and that some of the proceeds of the customers' fund may be used to pay the costs of administration?

Mr. Kimber: We are not suggesting that.

The Chairman: I gathered that you did, earlier this morning.

Mr. Kimber: Then I misled you. Not in connection with the cost. We think those securities should go out. Therefore, those securities would not bear any cost of the administration of the estate, because they do not form part of the assets of the estate.

Senator Connolly: Could we take it a little further? At the top of page 16 of your brief you talk about identifying the securities, which I understand to be stock certificates, or documents evidencing ownership of shares or bonds.

What about the case where the transaction has not been completed—where the stock certificates have been sold and an order has been put in to buy them and the transaction has not been completed—but on the books of the broker there is an indebtedness to the client, because he is conducting the process, he is rendering a service? Are you saying that those moneys, in connection with transactions that have not been finally wound up in the hands of the person who sold the last certificate, should be in the bankruptcy?

Mr. Kimber: The moneys?

Senator Connolly: Yes.

Mr. Kimber: As the law stands now, a claim for that money would just be a claim as an ordinary creditor. It

would not be trust money. That is different from the legal profession, but it is a different business. To now make that money trust money would be a fundamental difference in the operation of the broker.

Senator Flynn: Are you not suggesting that?

Mr. Kimber: No.

Senator Flynn: Why not?

The Chairman: What is the theory of that, Mr. Kimber? Is it because the moment your position becomes that of a creditor, you then have to take your chances in the bankruptcy?

Mr. Kimber: Yes. The most significant change in this bill, which is a good thing, is that the claim now goes up into the top priority.

Mr. Baird: In effect, you are not creating a trust fund commencing as of the date of the bankruptcy? You have said that certain assets form part of that trust fund as of the date of bankruptcy, and certain creditors, certain customers, have claims against that fund. You have created the concept of a trust, but you have not backdated it; rather, you started at the date of the bankruptcy.

Mr. Kimber: I do not know whether you mean I have done that.

Mr. Baird: No, but that is the proposal in the Bill, and it is a concept of which you approve?

Mr. Kimber: Yes. The major improvement, I believe, is the amendment making the clients' claims rank first against the securities and cash pool. Mr. Baird has pointed out some problems in the definition, but I think the intention of the department goes as far as he said the definition should go. That means the client of the firm ranks first against that big pool of securities and cash assets of the firm. The trade creditors—the stationery supplier, the computer supplier, the Bell Telephone Company, and so forth—

Senator Flynn: And the employees?

Mr. Kimber: Well, the bill would give the employees a claim against the first pool. Is that not right, Mr. Baird?

Mr. Baird: It is prorated against the customers' pool and the general pool.

Mr. Melvin C. Zwaig, C.A., Adviser to the Committee: I would like to come back for a moment, Mr. Kimber, to the position of the securities in transit at the date of bankruptcy where transactions have not been completed. According to the records of the stockbroker, we can identify certain of those securities as to whom they belong to, if the transaction is not complete. Should they not form part of the secured customer pool?

Mr. Kimber: I would think they would be caught up in our wording.

Senator Beaubien: The customer would have a contract, of course, which could identify the securities involved.

Mr. Baird: But by that time he will have sold the shares he delivered.

Senator Beaubien: But in delivering the shares he would get a receipt which shows the numbers of all the shares, and when the shares are sold, he gets a contract. Surely, it would be quite simple, if the man sold the securities and had not been paid for them, to identify them?

Mr. Baird: You are talking about new ones that are being purchased on his behalf?

Senator Beaubien: Well, as long as he gets paid for the securities he sold. If he does not get the new ones, he does not have to pay for them.

Senator Connolly: Stop it half way. He is selling securities. He wants the money. Assuming the securities have been sold and the money is about to come into the broker, do you mean to say, Mr. Kimber, that that money should go into the pool?

Mr. Kimber: It goes into the pool, but a preferred class pool, which is not the case under the present law. That is a big improvement over the present law.

Mr. Zwaig: What I am concerned about, Mr. Kimber, is exactly the point that Senator Connolly is raising. Assuming shares have been delivered and the money is to come in, that money should not go into the general pool, but rather into a trust fund whereby the deliverer of those securities, in fact, is entitled to those moneys.

I think what may be happening is that we are concentrating only on delivering back to customer, securities, and we may have transactions in process. I think some of those customers should be entitled to the cash received in settlement of the transaction.

Senator Connolly: As shown on the brokers' books.

Senator Flynn: That is not easy to prove. If you have a cheque on the way, you can say that it belongs to such-and-such a customer, but if the cheque is deposited in the bank a few hours before, it would go into the general fund.

Mr. Zwaig: This is where we have to rely on the brokers' records.

Senator Flynn: I like the idea of identifying so far as possible, and then giving the rest of the customers the position of secured creditors on the assets. I think those two could mix.

Mr. Zwaig: If you accept the concept that we are going to rely on the brokers' records you might be able to identify the cash that has come in.

Senator Connolly: This is the point we raised some time back. The methods are available now for keeping records leading to identification—perhaps not in specie, but certainly in a generic way—to say that 100 shares of such-and-such a stock and the proceeds that result from the sale of that stock belong to such-and-such a customer. Surely that is identifiable—

Senator Flynn: No.

Senator Connolly: —and should be segregated from any pool, except a trust pool, for repayment to the customer, in this case.

Mr. Zwaig: I am in full accord with that, if it can be determined from the brokers' records.

Mr. Kimber: With respect, I think Mr. Baird has stated the situation properly. What will be created under this bill will be a trust account much similar to the trust account found in a lawyer's office. At the time of bankruptcy, the claim of the client for cash is a claim against the cash that is in the firm. The other creditors do not have a claim against that. That is a trust fund in their favour.

Senator Beaubien: Mr. Kimber, if there is not enough money in the trust fund to satisfy everybody having a claim against it, they would then, accordng to your interpretation, take a loss?

Mr. Kimber: Yes. If there is a bankruptcy, there is always the risk of a loss. That is why the situation arises. However, the risk of loss under the scheme proposed in this bill is much less than it is under the present law. I do not like the "vesting" thing. I am not talking about that. However, the priority rankings under this bill are much better.

You have to appreciate what happens. The normal client moves to the top of the heap—and that would be the client who has an undelivered security or who is awaiting cash. That client goes to the top. The related clients go further down the list, and the deferred clients go further down again, so the normal clients are right at the top, and the securities owned by the lower groups fall into that pool. The normal client is likely to have a much better opportunity of being paid in full under the scheme of this bill than he does under the present law. I think in effect what the statute does is to create a trust fund for these people.

The Chairman: We have certainly thrown this point back and forth, but some of the senators and our advisers appear to feel, so far, that you are putting too much into the customers' fund and that some of the things you are suggesting should go into the customers' fund should really go to the customer.

Mr. Kimber: It is the same thing, with respect.

The Chairman: Is it?

Mr. Kimber: Yes, it is the customers' fund.

The Chairman: If you could guarantee that the customers' fund would be 100 per cent of what the customer is entitled to, then I agree with you. Take a transaction where there is a sale of securities; the money is in the course of transit. Let us assume the broker has become bankrupt. At the moment that money comes in, where does that money go?

Mr. Kimber: It goes into the top pool.

Senator Beaubien: Does the customer get that?

Mr. Kimber: If there is enough in that pool he gets it.

Senator Flynn: He is on top.

Mr. Kimber: I do not see how you can guarantee that he will get paid out of that pool if there is a shortfall in the pool.

Senator Beaubien: If you are holding securities for a customer, if the customer happens to sell some of the securities you are holding in safekeeping and gets the money, why should he be treated differently from another?

Mr. Kimber: All clients will be treated the same.

Senator Beaubien: You said you are holding securities in safekeeping, they would be set aside and the trustee would not get his hands on them. Is that not right?

Mr. Kimber: Perhaps we are talking about two different things. That is the difficulty. There are those securities that are safekeeping securities.

Senator Beaubien: What is the difference if you hold them in safekeeping or have them in safekeeping and all of a sudden I say, "Sell them and give me a cheque"? The day I say sell them, do I get into another category? I am not guaranteed?

Senator Barrow: That is right.

Senator Flynn: That is the problem.

Senator Laird: Are not the proceeds of the sale of a security equated to the security itself, and should there not be protection for receipt of the exact amount of the proceeds from the sale of the security?

Senator Connolly: I think Mr. Kimber is saying this. He will correct me if I am wrong. You cannot take one transaction and isolate it from a hundred others that the broker might be putting through in a single day. If some have been sold and the proceeds are available, that is all right. He may not sell them all, and then if the bankruptcy occurs you have sold ten or a thousand different batches of securities; you have paid for only half of them; you say there is a shortfall in the fund; it may come in the next day, but presumably these cheques that would come in in payment are made out to the broker who is now bankrupt, so the trustee sees money coming in and he takes it. Is that not what happens?

Senator Laird: Mr. Zwaig, is there an insurmountable bookkeeping problem if you actually equate the security that is sold to the proceeds of the sale?

Mr. Zwaig: I think that with present day record keeping we can follow a transaction through. This is the question I raise. I would not only like the customer to be secured for his securities, but if there is a transaction in process at the time bankruptcy intervenes, he should be secured for the funds that flow rather than falling into the first pool for prorata distribution amongst all customers.

Senator Laird: Can you answer this? Would it create a frightful bookkeeping problem? I think that is what, in effect, Mr. Kimber is trying to tell us.

The Chairman: In effect what you are saying is that you should identify securities and money as being the same thing, to be treated in the same fashion.

Senator Laird: Right.

The Chairman: I do not know whether you can carry on a broker's business that way.

Senator Laird: That is what I am trying to find out. Is it feasible?

Mr. Kimber: It is more than a bookkeping problem. Perhaps Mr. Cleather could speak to this.

Mr. Cleather: I am getting a little confused from this conversation. I think you are talking about two different things. Our brief has been directed to securities lodged in safekeeping that may or may not have resulted from any transaction. The other cases you are discussing, about free credits and the money securities that arise from a transaction, are treated as current creditors. All paid-for securities have to be put in segregation under the rules of the exchanges, and that is what I think our brief is directed to. Those securities that are in segregation or safekeeping are the property of the client, and they should not be subject to any trustee vesting.

Senator Connolly: We agree there 100 per cent.

Mr. Cleather: There is no bookkeeping problem as far as the segregation goes; they are particularly identified by client and stock; we are required to do that. I think where you get into a problem is in current transactions, where you are buying and selling, and there is always a delay in the procedure of the cheque if you are buying or delivery of the stock if you are selling. If you have sold stock, the credit goes into your account, you have not delivered the stock, that is not your fund because the broker does not have the stock.

Senator Laird: Suppose he has?

Mr. Cleather: Then it becomes a free credit; in this interim period he becomes a general creditor of the bankrupt stockbroker, although a preferred one I gather, he would be on the top of the pool.

Senator Flynn: Under the new legislation.

Mr. Cleather: Under the new legislation, yes. There should be no problem from a bookkeeping point of view. However, as Mr. Kimber has pointed out in the discussion, when a stockbroker gets into a bankrupt state, it is usually as a result of bad management, and probably there will be some problems in identifying those transactions that are in process.

Senator Laird: We are assuming they can be identifiable.

Mr. Cleather: If they are identifiable you should not have any problem.

Senator Laird: I am confused, because I was taking it from Mr. Kimber that somehow or other it would not necessarily result in a return of 100 cents on the dollar to the vendor of a security. Am I right in that conclusion?

Mr. M. Bélanger: President, Montreal Stock Exchange: There is just one point to add on that. We are concerned here with the Bankruptcy Act and its effect on customers. However, in addition the industry has this National Contingency Fund, and if we look at the ultimate result in the case we are discussing, supposing free credit, it is not identified, it goes into the fund, the clients lose it, and get paid only 80 per cent from the proceeds of the bankruptcy. They will be paid the other 20 per cent out of the contingency fund. Any bona fide customer is, through the whole system, fully protected. We have an interest in making the Bankruptcy Act as efficient as possible so that the administration period is as short as possible and payment is made out as fast as possible, so that both the clients can get as much as possible out of the bankruptcy and the NCF would have less to cover, and that would be done more quickly.

In making our major point, in trying to take the securities in safekeeping, in segregation, out of the pool we want to maintain the situation that brokers, when somebody puts funds in their hands in trust, are not in fact losing all credibility. As Mr. Kimber mentioned, there is some over-kill in the legislation. There is no reason why a broker who has $80 million in funds in safekeeping should have those $80 million used as part contribution to the settlement of a bankruptcy. Once you have taken that out, there will always be some grey area.

The important thing in the legislation is to make sure that we have rules in the grey area, because in the past the situation has arisen of the trustee having to go to the courts and make long searches as to what to do. Even if there are grey areas, I think the bona fide customers, both with the act and the NCF, should be fully protected, and they will be better protected if they have clear directives on the grey areas so that the trustee can proceed expeditiously in settling the bankruptcy.

Senator Laird: That is just dandy except for just one thing. Suppose you end up with no contingency fund?

Senator Connolly: The Contingency Fund is something the industry has in being now.

Mr. Bélanger: Oh yes.

Senator Connolly: It is constantly there. It is a sort of insurance protection.

Senator Laird: We have insurance protection in the practice of law, but that does not mean that in the legislation we should take that into account at all. We have to write the legislation.

Senator Flynn: They do not take it into account.

Senator Laird: That is right, they don't.

Mr. Bélanger: You are quite right, the legislation does not take it into account, and that is quite a valid point. It raises the question whether the whole set-up should be covered in the legislation. As Canadian practice has shown, the present system works, and I think we would be much better off to keep it working that way, knowing very well that if at some point in time there is some disaster that the present system does not meet it is always possible to have new legislation to meet that situation at that time, as in fact has happened in all countries that have become involved in public legislation.

The Chairman: It seems to me that we have been back and forth over this problem, and the real difference in the discussion as between Senator Laird and some members of the panel seems to be at what stage you draw the line for the things that go back directly to the

customer and for the things that go into the customer's pool. There are some different views in the committee on that. That is the problem.

Mr. Kimber: We recognize that that is the problem. We have undertaken with the Department that we will work with them to help them draw that line and we certainly would like to work with Mr. Baird to try to draw the line.

The Chairman: Even when they draw that line, they still have to satisfy us—or they do not get their bill.

Mr. Kimber: We will try to satisfy them and then try to satisfy Mr. Baird, or in the other order. I think we would like to satisfy him first.

Senator Flynn: I wonder whether the legislation is not treating the stockbrokers in a preferred way. Let us say we were identifying people and the customer cannot identify the security; we would be in the position of secured creditors.

There are other people who have revolving trusts and where the confusion would not permit a client to get the same treatment. I was wondering whether we should not say that the same principles should apply to all people who are in a trust position—like a stockbroker.

The Chairman: Except that carrying on the business of stockbroker is such that it just would not lend itself administratively.

Senator Flynn: I am just thinking across the country. I am thinking of lawyers and all these people. We all agree that we should retain the general rule of identification. If you can identify what belongs to you, you can take it and you can have the trustee give it to you. If you cannot, if it has been confused in, let us say a major trust fund, then all the people who are entitled to that trust fund will get special treatment on that part of the fund. If it has been confused with the estate proper of the main trust, then as we put it in this legislation you have a secured position.

Mr. Baird: You raise a very valid point, Senator Flynn, concerning rights of secured creditors. Supposing the stockbroker has given a bank an assignment of accounts receivable or has given a debenture to a bank covering all his assets, these provisions clearly conflict with the rights of a secured creditor of the broker. I do not think the new bill, or even the presentation here, has even considered that problem. I know I have not.

Senator Connolly: Do we not have to make a distinction in the case of a secured creditor who advances money on the basis of a security which he has deemed to be adequate for his purposes? That is one case. There is the other situation, where you would have a person putting into the trust, putting into the hands of another person in trust, a piece of property. He is not valuing the security, he is not taking a risk on whether or not a mortgage that he has is adequately secured by the property against which it is registered; he is taking a chance in a commercial transaction.

In the case of the trustee, where he puts the money into the hands of a trustee and it is identifiable, surely his right is to get that whole thing back or its equivalent. I think the difference is betwen the secured creditors.

Senator Flynn: But now you are creating a new class of secured creditors for the stockbrokers and saying, "Well, why not do it for others, if you want to do it?" There would also be the conflict with the other secured creditors that are not created by the bill.

Senator Connolly: For the preferred creditors.

The Chairman: If they have identified the property. If we have not any further suggestions from the witnesses, then it is going to be something the committee will have to consider.

Senator Flynn: Yes. I was just pointing out that it is a rather surprising situation that in the end what would appear to be something that is against the stockbroker would probably be creating a security that people would appreciate.

The Chairman: I think we have said all that can be said on this point.

Senator Flynn: It is helping your contingency fund to have the secured creditors. Your fund will not have to do that much under the new laws as under the old laws. That is what Mr. Bélanger was saying.

Mr. Kimber: We hope.

[*Translation*]

Senator Flynn: Yes, agreed.

Mr. Bélanger: Yes, agreed, providing the new act gives us more expeditive procedures.

Senator Flynn: Yes, agreed.

Mr. Bélanger: One of the reasons the fund had to pay more is that it took a long time to reach a settlement, and as a consequence it received less money.

[*English*]

Senator Connolly: I do not think we convinced Mr. Bélanger on that matter.

Senator Flynn: No. We can keep talking.

Mr. Kimber: Except that it exists.

Senator Connolly: It is important to the industry.

Mr. Kimber: It is important to the client.

The Chairman: On page 7 of your brief you say:

1. Specific provisions should be inserted to apply to securities

   (a) held by securities firms in safekeeping or segregation, or

   (b) placed by securities firms in securities depositories.

Would you tell us what is your concept of security depositories?

Mr. Kimber: There has been a good deal of work done by the securities industry, the banks, trust companies, insurance companies and other intermediaries to create a Canadian Depository for Securities, to try to get securities into this depository and eventually eliminate the certificate.

The government has supported us in this and we are developing this, we have spent a lot of money and a lot

of time developing it. We are afraid of what may happen if the bankruptcy bill becomes law.

Senator Connolly: You had better tell us what it is, before you go on with the comment.

Mr. Kimber: What the depository is?

Senator Connolly: Yes.

Mr. Kimber: It is securities left with banks, trust companies, insurance companies, owned by them, or by his brokers. They would be put into the central record keeping, in the safekeeping area. Then the transfers of securities between these participants and between clients would be done really on a computer but what you might call a book basis system. So the securities would not be going out to people normally.

Senator Connolly: You mean the certificates?

Mr. Kimber: The certificates would not be going out to people. There would be a recording in this central depository.

The Chairman: In which the securities would not necessarily be in the names of the owners.

Mr. Kimber: That is right.

Senator Connolly: Wait a minute. If they are going to be in the name of the owner, in the sense that the owner is going to be identifiable and his account is going to be identifiable—

The Chairman: We are not talking about that phase of it, senator. As I understand it, in this plan of establishing a depository the securities which would be put in there would not necessarily be in the name of the owner of the securities. They would be in the name of whoever is controlling or directing the depository.

Senator Beaubien: What would the ordinary man get, a receipt?

Mr. Kimber: He would get some kind of contract the same as you get now when you deal with a broker. If you leave your securities with a broker he sends you a contract saying, "We bought for you so many shares and they are in safekeeping." You would get the same type of paper as that contract, except that it would say they are in the depository. It is a tremendous idea. It should be a great saving of the costs in trading in securities. It is an idea which has been developed in other jurisdictions.

Senator Connolly: Where?

Mr. Kimber: The United States is looking at it; France is looking at it; there is some thought in the U.K. of developing this depository concept. Everyone who has looked at it thinks it is a great idea. I am afraid, however, that this Bill will discourage people from using the depository. On the one hand we are getting help from the government to develop the idea, and on the other hand, unconsciously, the government through this bill is discouraging that development.

The Chairman: The word "depository" can be confusing in itself. You might have to add some defining words to it.

Mr. Kimber: We have used the words "prescribed depository." That would be designated by perhaps the regulations or something of that nature. They would say, "That depository is properly run; that one."

The Chairman: You mean the bill should then provide for some definition of "depository"?

Mr. Kimber: Well,—

The Chairman: If we adopted your amendment.

Mr. Kimber: "Prescribed securities depository" is the wording we have suggested in the amendment on page 15 of our brief. That would be a depository which would be prescribed, I assume, by regulations or perhaps by ministerial ruling.

Senator Connolly: Suppose a security depository system were established. Suppose I had 100 shares of Bell Telephone registered in the depository. Who would be the owner of those shares so far as Bell Telephone's books are concerned?

Mr. A. G. Kniewasser, President, Investment Dealers Association of Canada: You would, sir.

Senator Connolly: It would not be the trustee?

Mr. Kniewasser: No. Actually, none of the rights of the shareholder are lost. The idea of the depository is simply to cut down the cost of moving paper around. The certificates are all held in one place. Moreover, with respect to the settlement system, there is the mechanism of using a computer to simulate people running around delivering and balancing their transactions with other people. Therefore the economies are two. A third point is that the system is already running. We are doing $90 million a month of settlements now—brokers, banks, insurance companies and trust companies—in the system. If we keep it going we should have an expanded settlement system bringing in bonds as well as equities within one and a half years. You can see that that is a major efficiency and a major economy in the system because computers facilitate the easy tracing of ownerships and so on.

Senator Connolly: What evidence would I have that I owned my 100 shares?

Mr. Kniewasser: A printout.

Senator Connolly: Would I receive a proxy at the time of the annual meeting?

Mr. Kniewasser: Indeed.

Mr. Kimber: As Mr. Kniewasser has said, none of the rights of the shareholder is lost.

The Chairman: Mr. Kniewasser, it may be that a particular broker would put in that depository 1,000 shares of Bell Telephone which would represent a sum total of Bell Telephone shares held by perhaps 10 or 15 of his customers. When those shares were received at the depository the whole bundle would be transferred into the name of the depository and there would be one certificate. Is that correct?

Mr. Kniewasser: That is right. The other point, sir, is that the system minimizes the problem we have been

grappling with this morning because it expedites the settlement system. At present we have a three-day settlement, and with the mails the way they are it is difficult to get securities delivered and back in. The new system reduces the scope of the problem of the in-transit security, because it is almost locked in and is almost instantaneous.

Senator Connolly: And identification is complete.

Mr. Kniewasser: That is right.

Mr. Baird: If a broker wants to borrow against those certificates, how does he borrow against them?

Mr. Kimber: If he is borrowing against the bank, it is merely by having a record made on the depository that the security is now held by the bank.

Mr. Kniewasser: You can hit the computer at any time to show who owns what in the system.

Mr. Baird: In other words, there would be a transfer.

Mr. Kimber: Not a physical transfer, just a transfer on the record.

Senator Flynn: There is the slight problem that people might tend to forget about the shares they own if all they have in their possession is a printout. In such a case the shares might not be tracable after those persons have died.

Mr. Kniewasser: I suppose when people started to open bank accounts the psychological situation with respect to bank books was the same—the same hazard existed. No doubt over time people will become accustomed to regarding printouts in the same list as their bank statements. There may be a period of transition in which people would like to have a share printed and delivered to them.

Mr. Kimber: Mr. Chairman, Mr. Baird mentioned the definition of "related customer". The purpose of the bill is to give a lesser claim to those people who are the owners of the securities firm. We agree with that entirely. However, the bill defines an owner as a person who has a 5 per cent interest and we feel that that is too high a figure. We would like to see it defined as a person who has any interest in the securities firm. We believe they should rank at the bottom. That is the practice of the industry today with respect to our own by-laws and our own contractual arrangements which we make with people who come into the business. They have to stand behind the clients. Therefore, we would like to see the legislation so provide. In that respect we say the definition is not wide enough. But then I turn the coin over and I say that in another aspect the definition of "related person" is too wide because "a person related to the owner" takes in a very wide group of people. For example, it would take in the father-in-law of a shareholder of a brokerage firm, and, if his securities were in that brokerage firm, he would be treated the same as the owner of the firm. We think that is much too wide.

Senator Flynn: Would you draw a distinction between the father-in-law and the mother-in-law?

Some hon Senators: Hear, hear.

Mr. Kimber: That's very good. We have suggested that the wording in this piece of legislation should be the standard wording used in the Securities Act, namely, that a person is related if he is a relative and lives in the same residence as the broker.

The Chairman: Mr. Baird, Mr. Zwaig and I have been discussing this for the last few days, Mr. Kimber. A difficulty we see with respect to the limitation of "related person" is that if you take the ordinary concept of father-mother, father-son or daughter, brother-sister, why would you have to include the restriction that they must live in the same house?

Mr. Kimber: I think what the bill is trying to get at is cases of preference being given to these people by the broker. He is probably running the account, and may give that account some preference. I think that the test there probably is as good as any, if you use the residence test, because that means there is a very close physical relationship, if I may use that word.

Senator Connolly: Suppose they all live in the same high rise?

Mr. Kimber: Well, I used the word "residence".

The Chairman: Mr. Kimber, if we follow your proposed definition of "in the same house", you reduce the number of people who would come under that description.

Mr. Kimber: Yes. We think it should be reduced in that area. We think that the definition is much too broad. It catches a lot of very unrelated people. It catches people who are not related to the brokerage firm at all.

The Chairman: You mean like a son who gets married and moves away from home, and you are dealing with the father, who has an account with the broker. The son would not be a related person then.

Mr. Kimber: He would be related if he were the owner of the brokerage firm.

Mr. Baird: No. The father owns the brokerage firm, and the son moved away from home.

Mr. Kimber: We would not catch him, and I think that is proper; nor would we catch a brother. After all, if one brother works in a brokerage firm why should his brother, who is a separate man, be involved?

The Chairman: I was not arguing as to whether it should or should not be; I just wanted to be clear as to what you intended, and why.

Do you have another point?

Mr. Kimber: There are other points in our brief. There are two points mentioned there. I think they are primarily drafting points. We have discussed them with the department, and we would like to discuss them with Mr. Baird.

Mr. Baird has raised drafting points this morning which I think have a great deal of merit to them, and I think if you would permit us to do so we would like to discuss those with him. On the definition of "customer" he is right. On the definition of "securities" he says this does not take in bank deposits or accounts receivable,

and I think that is a real danger in the act. We have raised that with the department, and I think they recognize that there may be some defects there. It seems to me that the costs of administration, perhaps, should be apportioned on some different basis than that proposed in the bill.

The Chairman: Of course, you have to go where the money is.

Mr. Kimber: Since most of the assets of the brokerage firm are in the securities pool to the extent of 80 or 90 per cent, that means that the clients are paying 80 to 90 per cent of the cost of the bankruptcy. I think there could be another test there of how those costs are to be apportioned.

I appreciate being here, sir. As is usual, the senators raised some very knowledgeable and difficult questions. I appreciate this. We will sharpen up our thinking. Thank you all gentlemen, for this opportunity.

The Chairman: Thank you. The Committee then proceeded to the next order of business.

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FIRST SESSION—THIRTIETH PARLIAMENT
1974-75

THE SENATE OF CANADA

PROCEEDINGS OF THE

STANDING SENATE COMMITTEE ON

BANKING, TRADE AND COMMERCE

The Honourable SALTER A. HAYDEN, *Chairman*

Issue No. 47

THURSDAY, JUNE 26, 1975

Seventeenth Proceedings on:

"The advance study of proposed legislation respecting the Combines Investigation Act, competition in Canada or any matter relating thereto."

SECOND INTERIM REPORT

(Witnesses: See Minutes of Proceedings)

29412—1

STANDING SENATE COMMITTEE ON
BANKING, TRADE AND COMMERCE

The Honourable Salter A. Hayden, *Chairman*

The Honourable Senators:

Barrow
Beaubien
Buckwold
Connolly (*Ottawa West*)
Cook
Desruisseaux
Everett
*Flynn
Gélinas
Haig
Hayden
Hays
Laird
Lang
Macdonald (*Cape Breton*)
Macnaughton
McIlraith
Molson
*Perrault
Sullivan
Walker—(19)

**Ex officio* members

(Quorum 5)

Order of Reference

Extract from the Minutes of Proceedings of The Senate, October 16, 1974:

"With leave of the Senate,

The Honourable Senator Hayden moved, seconded by the Honourable Senator McDonald:

That the Standing Senate Committee on Banking, Trade and Commerce be authorized to examine and report upon any bill relating to competition in Canada or to the *Combines Investigation Act*, in advance of the said bill coming before the Senate, or any matter relating thereto;

That the Committee have power to engage the services of such counsel, staff and technical advisers as may be necessary for the purpose of the said examination; and

That the papers and evidence received and taken on the subject in the preceding session be referred to the Committee.

The question being put on the motion, it was—
Resolved in the affirmative."

Robert Fortier,
Clerk of the Senate.

Minutes of Proceedings

Thursday, June 26, 1975
(62)

Pursuant to notice the Standing Senate Committee on Banking, Trade and Commerce met this day at 11:20 a.m.

SUBJECT: "The advance study of proposed legislation respecting the Combines Investigation Act, competition in Canada or any matter relating thereto."

Present: The Honourable Senators Hayden, (*Chairman*), Barrow, Beaubien, Connolly (*Ottawa West*), Desruisseaux, Flynn, Hays, Laird, Lang, Macdonald, (*Cape Breton*) and Walker. (11)

The Chairman read to the Committee the Second Interim Report and following discussion thereon, it was *resolved* that the Report be presented to the Senate this day.

At 11:35 a.m. the Committee adjourned to the call of the Chairman.

ATTEST:

Frank A. Jackson,
Clerk of the Committee.

Second Interim Report

Thursday, June 26, 1975

On October 16, 1974, the following order of reference was made by the Senate:

"That the Standing Senate Committee on Banking, Trade and Commerce be authorized to examine and report upon any bill relating to competition in Canada or to the Combines Investigation Act, in advance of the said bill coming before the Senate, or any matter relating thereto;

That the Committee have power to engage the services of such counsel, staff and technical advisers as may be necessary for the purpose of the said examination; and

That the papers and evidence received and taken on the subject in the preceding session be referred to the Committee."

Pursuant to the above order of reference, your Committee now presents its Second Interim Report as follows:

Since your Committee's Interim Report, dated March 18, 1975, on the subject-matter was tabled, it has been brought to its attention by the International Air Transport Association that the Canadian Government has entered into air transport agreements with the Governments of Australia, Belgium, Denmark, Fiji, France, the Federal Republic of Germany, Ireland, Israel, Italy, Jamaica, Japan, Mexico, the Netherlands, New Zealand, Pakistan, Peru, Switzerland, the United Kingdom and the United States.

These agreements require, directly or indirectly, that airlines should reach agreements in respect of tariffs and, where possible, this should be done through the Traffic Conference system of the International Air Transport Association which was incorporated by Act of Parliament in 1945, and recently amended to enable charter carriers to be admitted to membership. The resulting agreements must be filed with the Canadian Transport Commission and the Commission has control over the tariffs resulting therefrom.

As Bill C-2 would extend the application of the *Combines Investigation Act* to "services", the making of such an agreement might constitute an offence under the Act, thereby jeopardizing the entire international air transport rate-making system which has been recognized by the Canadian Government up to now.

In your Committee's opinion there is at least a reasonable doubt as to whether jurisprudence under the present provisions of the *Combines Investigation Act* holding that an industry whose activities are regulated by a government body are, to that extent, exempt from the application of the Act, would cover the position of Canadian air carriers. Your Committee considers that the public can be better protected through regulation and control of air transportation matters by a single government agency and accordingly recommends that agreements affecting air transportation should be specifically exempted from the application of the *Combines Investigation Act* as amended by Bill C-2. The following is a suggested text of a provision to be inserted in the Act for this purpose:

"4.3 This Act does not apply in respect of agreements or arrangements affecting air transportation reflected in any written contract filed with the Canadian Transport Commission pertaining to the pooling or apportioning of earnings, losses, traffic, service, or equipment, or to the establishment of transportation rates, fares, charges or classifications, or for preserving and improving safety, economy and efficiency of operations, or for controlling, regulating, preventing or otherwise eliminating destructive, oppressive or wasteful competition or for regulating stops, schedules and character of service, or in respect of other co-operative working arrangements, including the collective selection and administration of agencies for the sale of air transportation."

Respectfully submitted,

Salter A. Hayden,
Chairman.

The Standing Senate Committee on Banking, Trade and Commerce

Evidence

Ottawa, Thursday, June 26, 1975

The Standing Senate Committee on Banking, Trade and Commerce met this day at 11.20 a.m. to examine and consider the advance study of proposed legislation respecting the Combines Investigation Act, competition in Canada or any matter relating thereto.

Senator Salter A. Hayden (*Chairman*) in the Chair.

The Chairman: Now, honourable senators, I wish to deal with a report that I would like to table in the house this afternoon on the international air rates in connection with Bill C-2.

We had a meeting the other day, but I thought before I tabled the report the committee should see what it is and what the form is. It follows the evidence which was given by Dr. Thomka-Gazdick when he was here a week ago. Perhaps the simple thing to do is to read it. This is the second interim report:

> Since your Committee's Interim Report on the subject-matter was tabled, it has been brought to its attention by the International Air Transport Association that the Canadian Government has entered into air transport agreements with the Governments of Australia, Belgium, Denmark, Fiji, France, the Federal Republic of Germany, Ireland, Israel, Italy, Jamaica, Japan, Mexico, the Netherlands, New Zealand, Pakistan, Peru, Switzerland, the United Kingdom and the United States.
>
> These agreements require, directly or indirectly, that airlines should reach agreements in respect of tariffs and, where possible, this should be done through the Traffic Conference system of the International Air Transport Association which was incorporated by Act of Parliament in 1945, and recently amended to enable charter carriers to be admitted to membership. The resulting agreements must be filed with the Canadian Transport Commission and the Commission has control over the tariffs resulting therefrom.
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> As Bill C-2 would extend the application of the *Combines Investigation Act* to "services", the making of such an agreement might constitute an offence under the Act, thereby jeopardizing the entire international air transport rate-making system which has been recognized by the Canadian Government up to now.
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> In your Committee's opinion there is at least a reasonable doubt as to whether jurisprudence under the present provisions of the *Combines Investigation Act* holding that an industry whose activities are regulated by a government body are, to that extent, exempt from the application of the Act, would cover the position of Canadian air carriers. Your Committee considers that the public can be better protected through regulation and control of air transportation matters by a single government agency and accordingly recommends that agreements affecting air transportation should be specifically exempted from the application of the *Combines Investigation Act* as amended by Bill C-2. The following is a suggested text of a provision to be inserted in the Act for this purpose:—
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> "4.3 This Act does not apply in respect of agreements or arrangements affecting air transportation reflected in any written contract filed with the Canadian Transport Commission pertaining to the pooling or apportioning of earnings, losses, traffic service, or equipment, or to the establishment of transportation rates, fares, charges, or classifications, or for preserving and improving safety, economy and efficiency of operations, or for controlling, regulating, preventing or otherwise eliminating destructive, oppressive or wasteful competition or for regulating stops, schedules and character of service, or in respect of other co-operative working arrangements, including the collective selection and administration of agencies for the sale of air transportation."

I may tell you that we cleared this form with the International Air Transport Association, and it follows in much of its language the language used in the corresponding United States legislation.

I should tel you also—possibly I did so the other day—that in dealing with shipping, and the shipping conference, by which rates, et cetera, are regulated, there was a specific act passed in 1970 by this Parliament, entitled The Shipping Conference Exemption Act. One section of that act specifically provided that the Combines Investigation Act did not apply to the agreements on tariffs of rates, et cetera, determined by the shipping conference. Why the agreement with regard to air rates was not picked up at the time., I do not know. It appears to me that when you look at Part V of the Combines Investigation Act as it is reflected in the bill before us, when it comes to pricing, and agreements in relation to that sort of thing, the query might be raised as to whether that is a service or whether it does not come under a larger or broader description of trade and industry. To be safe, therefore, the committee felt the other day that this provision should be specifically made, to ensure that these operations and the fixing of internatinal air travel rates should be exempt.

I think I told you that we became very much concerned in the course of conferences with officers of the Department of Consumer and Corporate Affairs when two things were suggested. One was that we really did not need this exemption, because the law at the present time, in view of the *Canadian Breweries* case, is authority for the proposition, and that where a trade or industry is regulated by a province, then you cannot conclude that there is detriment to the public. This was one of the things, and the next was that in the course of the discussion it was indicated that

the department might—and I think the language used was this—"revisit the *Canadian Breweries* case." I take it that since this man was essentially French-speaking and perhaps was not quite thoroughly at home in using English, he may have translated some special word used in French. I am trying to understand the application of the word "revisit" in the circumstances.

Senator Flynn: It can mean "re-examine" or "review."

The Chairman: Perhaps it means "test"?

Senator Flynn: It is often used.

The Chairman: So it would appear that we are going to assure the peace of mind of IATA, which is the conference that is used for the establishment of international air travel rates. As you know, Canada can enter into an agreement covering air travel, tariff, safety, routes and other things of this sort, but then the specific bodies that carry on the operations—for instance, Air Canada or CP Air in Canada and their corresponding numbers in, say, the United Kingdom—would agree in the agreement made that all these matters would be settled through IATA. So this is a vehicle that was set up for that, and it was created here in Canada by a private bill in 1945. I think that for some time before that they operated as an association or a partnership or something of that kind. So the matter of international air rates is very important for the continued, and I would say, successful operation of this whole system, and they should not be exposed to any uncertainty. Clearly since you have the regulation by virtue of which the Aeronautics Act requires that these schedules be filed with the Canadian Transport Commission, and they have authority to deal with these rates, then you do have regulation, and if somebody wants to complain they can complain.

I was proposing to table this this afternoon. As you know, there is no debate at that stage, and if the members in the Senate this afternoon want a short explanation—I stay away from the word "simple" and say simply "short" explanation—then I will give it. Do you approve of the tabling?

Senator Connolly: This all flows from the evidence we had here the other day form the man who came from IATA?

The Chairman: Yes.

Senator Lang: Where is this bill now, Mr. Chairman?

The Chairman: Well, it is in the House of Commons, and there they have the report of their committee, and they are proceeding with the second reading stage, I think. They are proceeding to discuss these proposed amendments and their effect on the different clauses of the bill. Certainly they will not have another run at it until after Friday of next week. By now they may have got through about 40 per cent of the bill with the amendments, so when it will come forward I do not know.

Senator Lang: How do we bring this to their attention?

The Chairman: I can tell you, Senator Lang, that they read our *Hansard* very carefully, and they know that we have made these recommendations. The moment the report is made in the Senate and tabled, we will send them copies to be sure that they know about it.

Senator Lang: I did not know that they read our *Hansard*!

Senator Flynn: Perhaps not in the House of Commons, but they do in the departments.

The Chairman: So, honourable senators, is it agreed?

Hon. Senators: Agreed.

The Chairman: If what was announced yesterday becomes effective, although there was some suggestion that we might sit on Monday and Tuesday of next week, I think we can assume that next week will be a week in which the Senate will not sit so, therefore, the committee will not sit either. If we are sitting the following week, we may have a form of report on certain items in the bankruptcy bill for your consideration.

If there are no more questions, shall we adjourn?

Hon. Senators: Agreed.

The committee adjourned.

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1974-75

THE SENATE OF CANADA

PROCEEDINGS OF THE

STANDING SENATE COMMITTEE ON

BANKING, TRADE AND COMMERCE

The Honourable SALTER A. HAYDEN, *Chairman*

Issue No. 48

WEDNESDAY, JULY 9, 1975

Fifth Proceedings on:

"The *Subject-Matter* of Bill C-60, Bankruptcy Act, 1975"

(Witnesses: See Minutes of Proceedings)

29414—1

THE STANDING SENATE COMMITTEE ON BANKING, TRADE AND COMMERCE

The Honourable Salter A. Hayden, *Chairman*

The Honourable Senators:

Barrow	Hayden
Beaubien	Hays
Buckwold	Laird
Connolly *(Ottawa West)*	Lang
Cook	Macdonald *(Cape Breton)*
Desruisseaux	Macnaughton
Everett	McIlraith
*Flynn	Molson
Gélinas	*Perrault
Haig	Sullivan
	Walker—(19)

**Ex officio members*

(Quorum 5)

Order of Reference

Extract from the Minutes of the Proceedings of the Senate, May 13, 1975.

"The Honourable Senator Hayden moved, seconded by the Honourable Senator Bourget, P.C.:

That the Standing Senate Committee on Banking, Trade and Commerce be authorized to examine and report upon the subject-matter of the Bill C-60, intituled: "An Act respecting bankruptcy and insolvency", in advance of the said Bill coming before the Senate, or any matter relating thereto; and

That the Committee have power to engage the services of such counsel, staff and technical advisers as may be necessary for the purpose of the said examination.

After debate, and—
The question being put on the motion, it was—
Resolved in the affirmative."

Robert Fortier,
Clerk of the Senate.

Minutes of Proceedings

Wednesday, July 9, 1975.
(63)

Pursuant to adjournment and notice the Standing Senate Committee on Banking, Trade and Commerce met this day at 9:30 a.m.

SUBJECT: *Subject-matter of Bill C-60—Bankruptcy Act, 1975.*

Present: The Honourable Senators Hayden, (Chairman), Barrow, Buckwold, Connolly, (*Ottawa West*), Cook, Desruisseaux, Flynn, Laird, Lang, Macdonald, (*Cape Breton*) and Macnaughton. (11)

In Attendance: Mr. David E. Baird and Mr. Melvin C. Zwaig, Advisers to the Committee.

The Commitee *resumed* its examination and analysis of the provisions of the subject-matter of the above Bill, together with the assistance of the advisory staff.

At 12:00 noon the Committee adjourned to the call of the Chairman.

ATTEST:

Frank A. Jackson,
Clerk of the Committee.

The Standing Senate Committee on Banking, Trade and Commerce

Evidence

Ottawa, Wednesday, July 9, 1975.

The Standing Senate Committee on Banking, Trade and Commerce met this day at 9.30 a.m. to consider the subject matter of Bill C-60, respecting bankruptcy and insolvency.

Senator Salter A. Hayden (*Chairman*) in the Chair.

The Chairman: Honourable senators, we are continuing this morning our study of the bankruptcy bill. I would venture to be a little bit of a prophet. We think that if we sit one more morning we may have covered all the provisions of the bill. But then there are a few things, quite apart from that, that I have suggested to one of our advisers today. One is that in 1966, when we were studying the bankruptcy legislation, we put in an amendment establishing in the bankruptcy bill a similar provision to what we have in the Income Tax Act, that is, solicitor-client privilege. That provoked discussions that went on for about a month with the minister. I was over to his office quite a number of times. The way he put it was that it was going to interfere with their tidying up of the situation in Montreal, but then he made the famous statement that next year there would be a new bill and they would take it up then. Well, this is "next year"—from 1966! So, when any person pledges to me, in consideration of a bill, that it will be dealt with in the next year, I will look at that more closely. I think it is something we should weigh, that we should look at. I am trying to weigh it on the basis, what is there in the Income Tax Act that makes it so desirable to have that provision, and what is there in the administration of the Bankruptcy Act that would make it desirable in administration? Would it work against the Crown more in the Bankruptcy Act, in its administration, or in the Income Tax Act, in its administration? I think Mr. Baird has a word to say there.

Mr. David Baird, Adviser to the Committee: Mr. Chairman, one of the problems never resolved, and which has always been a problem in bankruptcy administration, is where a man goes bankrupt and where the trustee in bankruptcy takes over all his rights and powers. Would the trustee have the right to waive solicitor-client privilege? He could go to the lawyer who represented the bankrupt prior to the bankruptcy and he could say to that lawyer, "You must provide me with all the information in your possession regarding the affairs of the bankrupt." In practice this is not done, the solicitor-client privilege is acknowledged. But whether or not a solicitor-client relationship exists in this situation is left up in the air.

The Chairman: This is a subject matter we will have to pick up when we get too the end of the road.

This morning Mr. Zwaig is going to pick up where we left off the other day—that is, discuss the commercial arrangements end of the bankruptcy bill. Would you pick that up, Mr. Zwaig?

Mr. Melvin C. Zwaig, C.A., Adviser to the Committee: Thank you, Mr. Chairman.

Honourable senators, before I go into the topic of commercial arrangements, I have asked Mr. Jackson to hand out two exhibits. One is an article which appeared in the Montreal *Gazette* of June 21, 1975. The second is a letter from the Superintendent of Bankruptcy to me, dated June 26, 1975.

The article in the Montreal *Gazette* was reporting on a paper presented by the Superintendent of Bankruptcy to the 47th Annual Meeting of the Textile Trade Association of Montreal. One of the areas he covered was the question of the $2,000 wage earner priority. You will note the headline, "Bankruptcy Act may cause lenders to be more cautious". There is in the body of the article a comment in which Mr. Landry conceded that these provisions would affect the thinking of some secured money lenders.

To follow on, at the request of the members of this committee I asked the Superintendent of Bankruptcy, in a letter, if he could provide us with information that he might have on hand as to the dollar value of wage earner claims which go unpaid in estates. Based on the information that he has provided, and this he qualifies to the extent that the information is only as good as the records that are available in their department—in other words, they do not have records on receiverships and liquidations which are carried on outside of the Bankruptcy Act—but, based on those which he has available, if you look at the schedule under Sample B, you will see that the third item shows that for 132 estates the total of the value of security interest in those 132 estates is roughly $12 million. The value of wage claims which have gone uupaid is $239,750. So if we are looking for a dollar value as to what the charge would be against secured interest, we are talking in terms of about $250,000, based on a security interest of $12 million.

This figure is taken from statistics that do not include a total population, but it gives you an idea of the percentage of dollar value we were talking about when we suggested earlier on that perhaps we should consider establishing an indemnity fund for wage earners to claim against that fund, as opposed to having it as a charge against secured creditors.

The Chairman: The proposal that we made was that there should be a contributory indemnity fund.

Mr. Zwaig: That is correct.

The Chairman: In other words, the employee and employer would contribute to this fund. So far as these figures are concerned, the levy of the contribution would not be substantial.

Mr. Zwaig: It would not.

Mr. Baird: There is one qualification. These figures did not include the situation where there had been no bankruptcy; that is, where there had been a receivership. In most receiverships wages go unpaid, so you might find that unpaid wages are in fact higher than these figures.

The Chairman: Yes, but we are dealing with the bankruptcy bill. If there is a problem in receiverships apart from the bankruptcy bill, why, if it is big enough, let them devise legislation for it. We are trying to deal with what they have proposed and we are trying to deal with the basis for taking care, to some extent, of unpaid wages rather than giving the wage earner a priority for a position as against the secured creditors for the amount of the unpaid claim. We had concluded, I think, that this advantage to the wage earner of ranking ahead of the secured creditor would likely have a quite substantial impact on the ability of people in business to borrow, to get working capital. And the cost of that might be higher because, in any security that the lender might be taking, he has to reckon that if bankruptcy does intervene there is going to be a wage claim which will rank ahead of the secured creditor's position. Therefore, we were searching the other day, you will remember, to see if there was some other way of resolving the problem. I had suggested that we have a fund in the nature of an indemnity fund, and to the extent that these figures go it would indicate that the cost of that fund, the contributions to it, would not be such that there should be any opposition to it.

Senator Cook: If my arithmetic is right, is is 2½ per cent.

Mr. Zwaig: That is right.

Senator Cook: It hardly seems necessary to set up an entirely new system of contributions to take care of 2½ per cent.

Mr. Zwaig: It is also interesting to note how they arrive at the $2,000 cut-off. From that same schedule you will note that approximately 78 per cent of the unpaid wages in individual estates are $2,000 and under.

The Chairman: You have totalled the first three items on Sample B at the bottom of the page?

Mr. Zwaig: That is correct.

The Chairman: Is this what you wanted to draw to our attention?

Mr. Zwaig: Yes.

The Chairman: Was it on this occasion or on some other occasion that the Superintendent spoke somewhat favourably of the idea of an indemnity fund?

Mr. Zwaig: It was on the occasion that the *Gazette* reports on that he supported the idea of establishing an indemnity fund. I think, from the comments he made at that presentation, he certainly supported the idea quite favourably.

Senator Desruisseaux: Mr. Chairman, in Mr. Landry's letter to Mr. Zwaig he mentions in paragraph 2, on page 3, the insurance scheme which is in force in France. Would you have any comment on that?

The Chairman: Well, you have to look on that as a fact of life. Mr. Landry is suggesting that in France they do have an insurance system. Well, an indemnity fund might partake of the nature of insurance scheme. In other words, what he is suggesting about the low rate of claimants, of wage an earners, in France might be because before this system of insurance was introduced their chances of getting paid were so slight that they did not bother filing. Mr. Landry therefore thinks that the French figures might not be very reliable because they would be too low. I suppose it is a factor we may have to look at, but I would be more interested in their figures after the insurance plan came into force.

Senator Laird: Mr. Chairman, what sort of system of contributions to a fund of this kind would you contemplate? Would there be a percentage from the employee and a percentage from the employer, or what did you have in mind?

The Chairman: What I had in mind might be somewhat along the lines of deductions to, for example, Workmen's Compensation, or, if it is insurance, I suppose it would have to be deductions to pay the amount of the premium. Sooner or later, I suppose, too, any of these benefits, unless there is a statutory provision under which the wage earner has to make a contribution, ultimately transferred in the bargaining process and the employer ends up carrying it. But there is no use anticipating everything.

Senator Cook: When you contrast France with Canada, you have to take into account all sorts of things like whether they get paid weekly or fortnightly, because if in France a worker is one week's wages in arrears he will probably quit, whereas in Canada he might already have worked two weeks before discovering he is not going to get paid. That sort of thing comes into play.

Mr. Zwaig: Senator Cook, I will attempt to get some information on the scheme in France.

Senator Cook: I do not think it is necessary, really, because, speaking for myself, I wonder if we are really interested in pursuing this idea of an insurance scheme.

The Chairman: No. As a matter of fact, the one I was thinking of was the kind of scheme in which there is a contribution by the employer and the employee to an indemnity fund, rather than the idea of just creating a position for the wage earner, up to $2,000, that ranked ahead of the secured creditors. I think there are too many instances of problems that would affect the employer in his borrowing and in securing working capital, and the cost of such a scheme would be much more to the employer if the lender has to face the possibility that there is going to be some security ahead of his security.

Senator Buckwold: Mr. Chairman, I would like to go on record—,and I think I mentioned this, not at the last meeting but at the meeting before—of opposing any form of contribution from employers or employees. The amounts we are looking at are not particularly high. The development of more and more deductions from the cheques of employees, and more and more contributions from business itself, which in this case, frankly, will just be pennies, but is another deduction anyway, is a trend that I personally resent. I think the administrative cost would be high, in the sense of making sure that everybody made the proper contributions, that the funds got to the right places, and that people were not fooling with it; and I do not share your concern, really, Mr. Chairman, that the original concept of having the employees' claims ranking as a prior or primary charge against assets, would as significantly affect the credit of the individual company as—

Senator Laird: But, Senator Buckwold, if you add to that, for example, the way that they propose to treat secured creditors, then it is significant.

Senator Buckwold: I can understand that, and that is perhaps what we should be looking at. What I am saying is that I do not see another pool, developed from contributions by employers and employees, as being the solution to that problem. As an employer, I think I would resent the fact that you would be asking me, as, supposedly, an efficient operator, to pay for claims that would come about as a result of inefficiency on the part of other operators in the business world.

The Chairman: Well, Senator Buckwold, let us look at the situation in this way: if you do not adopt a basis of this kind, these things tend to end up along the lines that we see in this bill; that is, somebody other than the employee for whose benefit this priority is given ends up paying the shot. It is either the employers, or it is the local government, or it is the people of Canada, by reason of the contributions to the funds that the federal authority has to disburse.

The theory seems to be that the federal authority has an inexhaustible supply of money, which is only true to the extent that the income of the people who pay income taxes is inexhaustible—and I am not sure whether that is a good proposition, either in fact or in law—and so you are faced with the proposition that the person who is getting the benefit should make some contribution towards it. Your proposition is that you think the employee is getting the benefit, and the employer is not, and therefore only the employee should make the contribution.

Senator Buckwold: No. I am saying that there should be no contributions. As far as I am concerned, I am quite prepared to let creditors take that risk.

Senator Cook: It is like taking out a .303 gun to shoot a sparrow. The thing is minimal in its consequences, but you would have to have another deduction, you would have to have reports, you would have to have somebody to administer the whole thing, and I agree with senator Buckwold when he observes that everybody is pretty well fed to the teeth with deductions, especially now, with unemployment insurance contributions going up again, and so on.

Senator Buckwold: I just wanted to make my point clear. I was suggesting that there be no deductions from anybody. I do not really believe that for this type of thing, we require a fund that involves contributions either from employees or employers.

Senator Lang: Mr. Chairman, I tend to come to the same conclusion as senator Buckwold, though probably from another point of view. We are sort of working now, really, on the assumption that every business in Canada, sooner or later, is going to go bankrupt. How many businesses in Canada do go bankrupt, in fact, as a percentage of the total number of businesses carried on? If we decide on a fund like this, we are imposing it probably on 95 per cent of the businesses in Canada which are never going to go bankrupt, and I think that the imposition on those people is completely disproportionate to the benefits that might be involved in setting up a fund for those companies that actually do go bankrupt.

Senator Cook: That is what happened when they put the deposit insurance scheme into effect. All the sound people had to pay for those who were likely to go bankrupt and to become unsound.

The Chairman: That is right.

Mr. Baird: The burden that the present bill imposes is a burden on the lender. He is being required to permit the wage earner to be paid prior to the repayment of his loan. This is going to hurt the marginal borrower. The big borrowers, like General Motors and other large companies, will not be affected by this. It will be the marginal borrower that will suffer because of the fact that there is a possibility of a $2,000-per-man priority over the security that is being given by the bankrupt, to the lending institution; so the amount of money that might be available to him may be reduced, because the lender will be concerned that the security available will not be sufficient to repay the amount borrowed.

You have a particular problem in the labour intensive industries, such as the clothing industries, where there is a large number of employees, with relatively few tangible assets available to satisfy the loan, and I suspect that you will just bar that type of person from borrowing money at all, because the secured creditor will know for sure that he is never going to get his money back in the event of a bankruptcy.

You also have a problem in that the present bill can easily be avoided by setting up two companies, one to hire the employees, who do all the work, and the second company to own all the assets. The secured lender will, of course, loan the money to the second company, and the second company will loan the money to the first company to pay the employees, as long as it is profitable. If it is not profitable, the employees will go unpaid and you are back in the same unfortunate position that you are in now, where the employees are not being paid in the event of a bankruptcy.

The solution offered under the present bill, therefore, has really serious problems, and it is a really important question as to who shall bear the burden of the loss. Should it be by way of a universal insurance scheme, with a small monetary contribution? Should it be the lender who is loaning money to the company, of course with his eyes open? That is a very difficult decision to make.

The Chairman: Well, we are not resolving the question this morning, but we are kicking it around to ascertain what the various view points are. At a later stage, when we have finished our study of the bill, we will have to start agreeing on various matters in the bill that we think should be changed by way of adding to or taking away from them, or by reverting to the original act; so this is an early review of what we may have to consider when we come to make a decision on what recommendations should be proposed under the bill. However, we have had an exposure of these problems this morning, and a discussion of them.

Senator Connolly: Mr. Chairman, do we know whether the bankruptcy officials are following these proceedings?

The Chairman: Yes. They get *Hansard*.

Senator Connolly: They will see this discussion, then.

The Chairman: I made a statement to somebody in the department too the effect that I noticed their representative was not present have on most occasions. Their reply

was, "well, your *Hansard* is so good that it is much easier to study it." I know that they are looking at it.

Senator Buckwold: Mr. Chairman, what I consider to be a really major complication in this question of contributing to a scheme and building up a pool of funds, is, who is going to pay this? Is every law office going to pay it? Is it really likely to go bankrupt? I have not heard of any lawyers going bankrupt. Does a doctor have to pay it? Does the corner grocery store, where they do not have any employees, have to pay it? It is not like unemployment insurance or workmen's compensation; it is opening up a whole new field.

The Chairman: Well, we can have another look at this when we get right on that point.

Mr. Zwaig?

Mr. Zwaig: Thank you, Mr. Chairman. The topic I would like to discuss this morning is where I left off the last day, at page 15 in the binder, dealing with "Commercial Arrangement".

Under the present Bankruptcy Act we are quite familiar with the term "proposal". "Proposal" as used in the proposed bill in fact means a proposal to make an arrangement. So the first step really is that the debtor files a proposal which is subsequently approved by the creditors and ratified by the courts; and when that is done that proposal then becomes an arrangement.

When we are talking about an arrangement this morning we are talking in terms of the commercial arrangement, that is an arrangement for business as opposed to the arrangements for the consumer-wage-earner-debtor.

A creditor is deemed to be affected by an arrangement where his interests and rights are materially and adversely affected by the arrangement. The bill provides that the provisions dealing with the commercial arrangement prevail, notwithstanding any rule of law, including any rule of equity or anything in any other act of Parliament or in the legislature of a province or any instrument governing the rights of creditors, shareholders, classes of creditors or classes of shareholders. So we are dealing with the situation that we have discussed time and time again, where the commercial arrangement will affect the secured creditors. It will affect any instruments that have been entered into between the debtor and his creditors.

Who may file this proposal? The proposal can be filed by a bankrupt or by a debtor who is insolvent and unable to pay his debts. It is interesting to note—and this is for the protection of the general public—that certain persons are not able to file a proposal—that is to say, a bank, or any corporation insured under the Canada Deposit Insurance Corporation or guaranteed by the Quebec Deposit Insurance Board. Certain insurance companies are not able to file proposals, and credit unions included within the meaning of section 137(6) of the Income Tax Act are also not able to file proposals.

In addition, the bankrupt or the debtor who is insolvent and unable to pay his debts may file a proposal through the trustee that is administering his estate. Where there is a liquidator who has been appointed as a liquidator of an estate or a corporation that is in process of being dissolved, again he may file on behalf of that estate a proposal for an arrangement.

The Chairman: You are referring here to a situation where, for instance, a bank may have security in such form that in the case of certain events the creditor—that is to say, the bank—can appoint a receiver under the terms of whatever the security is that they have. Now you go on from there to deal with the question of the rights of the bankrupt to put forward the proposal.

Mr. Zwaig: That is right.

The Chairman: Now because there is a receiver in there at the instance of the creditor, could that form the basis for the bankrupt putting forward a proposal even if the actual bankruptcy has not occurred at that time?

Mr. Zwaig: Well, I think there are two things here. One is the situation where you have a liquidator being appointed under, let us say, the Winding-Up Act, and he is appointed with the idea that the company will eventually be dissolved and full payment will be made to existing creditors and any surplus would be paid for the benefit of the shareholders. During the course of his administration, he finds, because of a downturn in market conditions or something of that nature, that he cannot fulfill his mandate and pay all creditors in full. That liquidator, who was originally appointed under the Winding-Up Act, can then file a proposal to the creditors offering them a settlement of so many cents on the dollar rather than one hundred cents on the dollar.

The Chairman: But you do not have a trustee, as such, at that time.

Mr. Zwaig: At that time you do not have a trustee, as such.

The Chairman: Then the liquidator, under this bill, in those circumstances would have the right to file a proposal with a trustee?

Mr. Zwaig: That is right, with a trustee.

Now, to follow on from that, Mr. Chairman, and to come to the point that you are making, it appears that a person who has an admissible claim in a bankruptcy may file a proposal for that debtor that is in bankruptcy. Take the situation which you envisage, where you have a secured creditor who has appointed a trustee. Then that secured creditor, through its receiver, may in fact impose, as I read the bill, a proposal on that debtor—and this is a point which I cannot follow through because it is not clear in the bill.

My understanding of a proposal, and subsequently of the arrangement, is that you need the co-operation of the debtor and his goodwill in order to follow through the terms of the proposal, in addition to the goodwill of the creditors and the financial institutions to supply credit and to supply goods, services and finances. Yet here we seem to have a creditor with an admissible claim who can say, "Come on, debtor, let us file a proposal," and we are not too sure as to how you can get the debtor's co-operation from the way the bill has been drafted.

The Chairman: But who can resist the receiver, in the circumstances I have set out? Who can resist his application for a proposal?

Mr. Zwaig: As I understand the bill, the creditors cannot resist except by subsequently voting against the proposal, and it does not seem to be clear as to whether the debtors can resist, and I think it might be the receiver imposing the arrangement. I just cannot see how you get the concur-

rence of the debtor to go along with this type of arrangement.

The Chairman: That seems to negate the idea inherent in the word "proposal". Here a proposal would appear to be something you force on people, and I do not think that is the intent of the use of the word "proposal".

Mr. Zwaig: I agree.

The debtor who is insolvent and unable to pay his debts may file a notice of intention, and this is a good thing. This is where the debtor is unable to meet his debts as they become due and finds that he is in difficulty. He files a notice with the administrator in his locality saying that he intends to file a proposal, and he is given ten days to file that proposal.

There is a provision that this ten-day period, if it is too short, may be extended by the courts. The notice of intention states the name of the trustee who has agreed to act in the proposal and has the effect of staying proceedings. This is where we are back to our discussions of the previous days dealing with the secured creditors. That is, in the event of a stay of proceedings the secured creditors may not be able to act as quickly as he would like, may not be able to realize on his assets as quickly as he would like. So this is an area which, in my opinion, we should tick for discussion at a later date.

The Chairman: You mean, as to whether the putting forward of a proposal through the trustee by the debtor should be a stay of proceedings and would prevent the secured creditor from any realization on his assets.

Mr. Zwaig: It is putting forward the notice of intention which should be examined carefully as to whether and how the secured creditors are affected by the filing of that notice of intention.

The Chairman: When you say as to how they are affected, do you contemplate that the proposal might include some concessions on the part of the secured creditors?

Mr. Zwaig: No; I envisage that the debtor files a notice of intention and at the expiry of ten days does not file the proposal. The fact that there has been a stay of proceedings is now involved. For instance, in the case of a mechanics' lien filing, which must be done within 37 days, assuming that there is a notice of intention filed on the 28th day, the way I read the bill the secured creditor cannot do anything from the 28th to the 37th day to protect his proposed security, and then he loses it.

Senator Cook: He can apply to the court, can he not?

Mr. Baird: There is power for the court to remove the stay of proceedings. There is also a saving provision at the very back of the bill which refers to the effect of the stay of proceedings under the limitation period. It is clause 402, at page 176 of the orange book, providing that:

> 402. Extension of statutes of limitation.—Where a remedy of a creditor or the right of a creditor to institute or continue an action, execution or other proceeding against a debtor or his property is stayed by this Act, the period of time during which the right or remedy is so stayed shall not be included in the computation of a period of time prescribed by a statute of limitations period of prescription after which the remedy or right may not be enforced.

That sounds fine in print, but I think it will cause serious problems because, as Mr. Zwaig says, the notice of intention stays the proceedings and the filing of the proposal stays the proceedings. The mechanics' lien claimant in this situation might be stayed for three or four months. In the meantime the property might be sold and his lien rights would be gone. So, although he has a right to file a lien, in practice the property will be lost.

The Chairman: But the mechanics' lien provisions are under provincial statutes.

Senator Flynn: Yes. How can provincial statutes be amended by a federal statute?

The Chairman: Well, I suppose if some officials appeared before us from the Department of Justice, it might be urged that this is ancillary. I am not saying that I would buy it, however.

Senator Flynn: I mean that this is not a problem of the right, but whether a provincial statute can be amended. On the basis of the year it has to be a year-and-a-half and there is no provision in provincial statutes with respect to that.

The Chairman: No, in effect, the time in which the lien can be qualified is bring enlarged.

Senator Cook: Clause 92 is right on this point. It provides that the provisions of this Part shall apply notwithstanding any provincial legislation.

Mr. Baird: Yes, that is the intention, there is no question about that.

Senator Flynn: Yes, I know what the intention is, but whether it can be done is the question.

Mr. Baird: A compromise proposal which we have discussed is that although a secured creditor should not be stayed from proceeding to protect his security by filling the arrangement, he might be prevented from realizing on his security by selling the asset which is subject to his security.

Senator Cook: Unless a court so allows. On what grounds would the court act so as to do away with the stay of proceedings?

The Chairman: Two questions are involved in this: one is to stay the proceedings by the person entitled to file for the lien; the other is the question of englarging the time within which he may file. Now, under the federal legislation, clause 402, it would appear that it is provided that notwithstanding the limitation period within which filing must be carried out under the mechanics' lien legislation in the provinces it is not effective during the period of the stay.

Senator Cook: I agree, but my point is that under clause 95.(4), stay of proceedings, the cour is able to, if you like, set aside the stay.

Senator Flynn: If there is real prejudice to the secured creditor and something must be done immediately, the court would be allowed to proceed up to a point. For instance, under the Mechanics' Lien Act I suppose they would say five days' notice or do what you have to do within the expiration of 30 days and stay put until you proceed.

Mr. Baird: It seems to be an impossible task for a creditor to go to court every time he wishes to file mechanics' lien.

Senator Cook: The act provides that this Part shall apply notwithstanding any provincial legislation. Where application to the court is made under clause 93.(4), can the court set aside this legislation and declare that the provincial statute will apply and the filling can proceed?

Mr. Baird: Yes, the court can lift the stay and is given that power. Your question really is on what grounds would a court exercise that power. The statute provides no guidance on that at all. It does not say when the court should remove the stay and when it should not. It is left completely within the discretion of the court.

Senator Flynn: Yes, actual prejudice would have to be proven.

Senator Cook: Yes, but the legislation provides that this Part applies, irrespective of prejudice really.

Senator Flynn: It is actually a question of time, as to whether, for instance, the security could be sold at the particular time and if it were not sold then it would realize less in two months. The court would certainly consider that as being a valid ground for authorizing proceeding, because even if you say that this legislation amends all provincial legislation, it cannot prevent a fool from drowning.

Mr. Zwaig: I was about to refer to that point, Senator Flynn, that in the case of a security involving perishable goods the court may direct the sale of those goods and that the moneys be set aside in a separate fund until the interests of the secured creditors are met or dealt with.

Mr. Baird: Another situation might apply if the property of the bankrupt were abandoned, the house being subject to a mortgage and being vacated. The court in that situation might permit the secured creditor to take possession in order to lock the does and protect the premises, although there is a stay of proceedings.

Senator Flynn: Coming back to the question of limitation of action, I think the problem exists under the present legislation, but I do not know how the courts have resolved it, because you cannot take an action against the bankrupt. The time to do it under the provincial legislation has expired. Has the filing of a claim under the law the same effect as an ordinary action, which is the usual way to interrupt prescription or limitation of time? There is some jurisprudence on that presently.

Mr. Zwaig: Unless you can show real cause as to the basis on which the secured creditor is going to realize today under the existing act, the courts are very reluctant to interfere with the rights of the secured creditor under the present law.

Senator Flynn: Coming back to the problem of limitation, where we were saying the act would amend provincial provisions concerning limitation of action, this problem exists now and some solution has been found by the courts. There is nothing in the act which says anything about that, except that you cannot take an action against the bankrupt. You have to file a claim with the trustee. Filing a claim with the trustee is not the same as commencing an action before the ordinary courts—unless it is deemed as having the same effect as launching an action.

Mr. Baird: I do not know the answer. About 10 years ago I researched the question, but I cannot remember the answer. The problem arises when you want to sue for necessaries at the present time, a type of claim that survives the bankruptcy. Do you have to bring that type of action within this fixed period, notwithstanding the fact there has been the intervening period of the bankruptcy and you are subject to a stay of proceedings? I do not know the answer.

The Chairman: It seems to me, taking the mechanics' lien case as an instance, that you have so many days in which to perfect your claim to lien. If the stay of proceedings stops your forward progress in that direction some time within that period, all you need, really, is some provision under this bill by which the stay of proceedings does not operate in that situation. You are then not flying in the face of the provincial law. You are removing the stay of proceedings which would prevent the lien holder, or the potential lien holder, from going forward and perfecting his claim.

Mr. Baird: Similar to filing a chattel mortgage within a certain period of time. You have 30 days under the law in Ontario to file a chattel mortgage. Are you stopped from filing that chattel mortgage by the fact that the debtor makes a proposal?

The Chairman: If there is an exception, in a case of that kind, provided in this bill, that the stay of proceedings is not effective in those circumstances, that would deal with it, would it not?

Mr. Baird: Yes, it would.

Senator Flynn: We have to distinguish between the rights of secured creditors and the problem of the limitation of action. Under the present legislation secured creditors can proceed, but the trustee can intervene and stay the execution of the proceedings. That I think is a good principle. I do not know why they would abandon it. The problem now is what effect has the bankruptcy on the limitation of action when the Bankruptcy Act—as it does presently, and as it will do even more under the new bill—says you cannot take action against the bankrupt except by filing a claim with the trustee. Would that be the equivalent of an action that would interrupt the prescription or which would be the equivalent of an action in the court?

The Chairman: You are wondering whether the bill would make the filing of a claim equivalent, or tantamount, to the issuing of a writ?

Senator Flynn: Yes. For instance, you could probably proceed with the mechanics' lien if the notice filed with the trustee were equivalent.

Senator Connolly: Is there not jurisprudence on that point?

Senator Flynn: There is need under the present act, so far as the limitation of action proper is concerned. With regard to secured creditors, at present they can proceed. So there is no problem.

Senator Laird: Following this line of questioning, is it a fair question—confining ourselves to this business of commercial arrangements—to ask whether the present procedure works satisfactorily? Does it need amending? Does this new proposal in the bill constitute any improvement over the existing procedure?

Senator Connolly: that is a good question.

Mr. Zwaig: There is one flaw, as I see it, in the existing Bankruptcy Act, in that the secured creditor is outside the Bankruptcy Act. So that when a trustee is appointed, he has, in fact, very limited say on the realization of secured assets if the receiver has been appointed prior to the bankruptcy. The bill proposes to bring the secured creditor under the umbrella of the insolvency act, which I think is good. However, we are saying that even though the secured creditor comes under the new act, do not interfere in his rights so drastically that he loses his rights of recourse that he had as a result of an instrument he entered into with the insolvent or the bankrupt at that point in time. Your mechanics' lien is a good example. If he has a right to file his mechanics' lien action in 37 days, then, by a debtor filing notice of intention, or filing an arrangement, do not allow that to prevent him from making that filing within 37 days.

Senator Laird: That makes sense. If he can enforce his security under an umbrella, what is the difference if he is not protected under the umbrella? We discussed this before. You pointed out the problems that would arise concerning credit.

Mr. Zwaig: I do not think that the cost of credit will increase as a result of bringing the realization of the secured creditor under the insolvency bill. We are looking at the additional cost of the other areas that we were talking about. We were talking about the priority given to the wage earner, that the secured creditor's right to realize is affected to an extent under the arrangements for individuals as opposed to the commercial arrangement. If you recall, there were two types of arrangement which the individual was able to file. One was an arrangement by way of composition and the other arrangement by way of extension; and the secured creditor's rights of realization were affected to a greater extent than the point we are discussing right now.

Senator Laird: Apparently you do not find the proposals in the bill as obnoxious on this issue, as you do in connection with certain other matters in the bill. Is that a fair question?

Mr. Zwaig: That is correct, with the exception that certain areas have to be improved so that the secured creditor does not lose his rights to that security or to perfect his right to that security.

Senator Laird: I agree with you 100 per cent.

Mr. Baird: One of the basic problems we face at the present time, which I think is improved by the new act, is the fact that in a construction company situation it is impossible to make a proposal to creditors. This is because of the fact that each creditor has the right to file a mechanics' lien, is in the category of a secured creditor, and is entitled to proceed to realize on his security notwithstanding the fact that the proposal is filed. The new provisions of the act will permit a proposal for a construction company, because if you get the approval of 75 per cent of the creditors with mechanics' liens, you can then impose the proposal on 100 per cent of mechanics' lien claimants. This a right we do not have at the present time.

Senator Laird: So that is an improvement.

Mr. Baird: Yes.

Senator Connolly: How is that an improvement? It downgrades the right of the creditors of construction firms, all of whom have security in the sense that they have the right to file a mechanics' lien. Some of them are going to lose whatever security they had by virtue of the fact that they had the right to file a mechanics' lien. Is that really an improvement?

Mr. Baird: The improvement is the fact that everyone will be in the same category. Each of the creditors have the right to file a mechanics' lien against the building. If 75 per cent of them want to see building completed and sold as a completed that building, they could do so under the new legislation. There is no need to enter into negotiations with 100 per cent of the creditors in order to permit the building to be completed.

The creditors do not lose their mechanics' lien rights; rather, the will of the majority is imposed upon the will of the minority. It is usually a business decision rather than a loss. Those who vote against the proposal are still treated equally with the 75 per cent who voted in favour of it.

Senator Connolly: In other words, they are given the option to take a loss? Actually, they are not even given an option; they have to take a loss.

Mr. Baird: They have to accept the decision of the majority.

Senator Flynn: But you do not have to stay all proceedings of secured creditors to achieve that purpose. It seems to me that one could achieve that purpose by providing for all proceedings by secured creditors continued or commenced against the trustee and giving the trustee the right to go to court to stay the proceedings and impose the conditions.

I would put it in the reverse and say that you cannot do it unless you go to court. I would say you can do it by disclosing your action to the trustee, the trustee having the right, if it is contrary to the general interest of the creditors, to go to court and stay the proceedings or impose a solution.

Mr. Baird: You have to give the trustee a reasonable period of time to assess the situation and determine what he can do.

Senator Flynn: He can always get a stay of proceedings. The trustee could also be given the right to stop the proceedings by giving notice.

Senator Connolly: As a practical question, let me ask you this: if, to the extent that you have described in this immediate discussion, the right of the secured creditor to realize is cut down somewhat, then what is that going to do to the building trades industry? What is it going to do in the way of inhibiting people from wanting to deal with construction firms that they might have doubts about? Is it going to make it more difficult for those construction firms to obtain supplies? Will the suppliers impose conditions upon the contracting firm that will make the availability of supplies more difficult?

Mr. Baird: The question is, to what extent does the credit grantor in the construction industry rely on his mechanics' lien right when he is extending credit? Does he look to the fact that he has a mechanics' lien right when extending credit, and does that enter into his judgment at the time of extending credit?

It is very difficult to say to what extent the credit grantor relies on the right of a mechanics' lien when extending credit. Would he still extend the same amount of credit on an open account if he did not have amechanics' lien right?

Senator Connolly: I think in the back of his mind the supplier will always think of the fact that he has some kind of security available to him.

Mr. Baird: It is ingrained, I think, in his nature. He knows he has this ultimate right. A stay of proceedings, though, is really designed not to diminish that right but, rather, to maximize the ultimate recovery; to give the trustee in bankruptcy the right to look at the situation in an effort to maximize the recovery.

The stay of proceedings envisaged under this legislation, the inclusion of secured creditors under proposal arrangements, also is an attempt to make sure that there is the best possible recovery by the secured creditor. The secured creditor is going to get paid off the top. He is not going to be reduced in status.

Senator Connolly: His status is the same, but his money is not the same.

Mr. Baird: The problem is that interest costs and taxes continue to run. The property might depreciate in value. In those circumstances the securred creditors might suffer a loss as a result of a stay of proceedings.

Mr. Zwaig: The fact is that under the new legislation all of the mechanics' lien claimants will be treated in a particular file and in the same way. In other words, if 75 per cent of the secured creditors are for dealing with the matter in one way, they can in fact impose their majority right over the 25 per cent, and everyone is dealt with *pari passu*.

What can conceivably happen under the present legislation is the 25 per cent are working against the 75 per cent, and the 25 per cent may walk off leaving very little for the 75 per cent, or the majority.

Senator Cook: Does clause 103 have any bearing on this at all?

Mr. Baird: It envisages a situation where a proposal could be filed not covering all creditors. In other words, the proposal could specifically designate only certain categories of creditors as being covered. This is a novel approach to the situation. Under our present law, the proposal covers preferred and unsecured creditors, and you must cover all of them. You cannot ignore any part of them. This clause indicates that you could draft a proposal to cover only creditors with claims over $1,000, or only certain types of creditors.

This clause also gives one the right to deal with secured creditors, which right does not exist under the present law. We cannot stay proceedings or even deal with secured creditors in a proposal generally. We can stay proceedings for six months, but that is a limited right and one which is very rarely used.

Senator Cook: Are you talking about clause 103?

Mr. Baird: Yes, admissible claims. It states:

> Where a creditor is to be affected by an arrangement, he has an admissible claim under the arrangement—

So, it is not all creditors who have an admissible claim; it is just where a creditor is to be affected by a proposal. If you specifically do not mention a creditor, he is then not affected by the proposal.

Senator Flynn: Perhaps we should now look at how the secured creditors are affected under the present act. To what extent can a compromise be imposed on the secured creditors?

Mr. Baird: The only compromise that can be imposed on a secured creditor is under the Companies' Creditors Arrangement Act. It is not under the Bankruptcy Act at all. It is only available when a corporation has issued debentures or bonds secured by a trust deed. The situation in which you can now impose a compromise on a secured creditor is a very limited one.

Senator Flynn: Of course, there are several types of secured creditors. In this immediate discussion we were talking about those who are privileged under the Mechanics' Lien Act of Ontario. That is one class of secured creditor. It seems to me that a few minutes ago you were saying that you could force a majority decision in that case.

Mr. Baird: Under the new legislation, yes, but not under the present act.

Senator Flynn: That is one change. Are there other changes of the same nature? What about mortgages?

Mr. Baird: With respect to mortgages, a proposal can create a stay of proceedings.

Senator Flynn: That is all that can be done with regard to mortgages?

Mr. Baird: No, any type of secured creditor could have a compromise imposed upon him.

Senator Flynn: But you cannot force a compromise on all creditors having mortgages.

Mr. Baird: Yes, if you get a positive vote of 75 per cent of those creditors.

Senator Flynn: Even if the security or the properties affected by the mortgages are different from one creditor to the other?

Mr. Baird: That is a problem of the class of a creditor.

Senator Flynn: I agree, but this is quite different. If I have a mortgage on a hotel and somebody else has a mortgage on an office building, if you say, "We are going to force on you a 75 per cent compromise," it may be that my colleague who has a mortgage on the office building will be happy to get 75 per cent and will force on me a 75 per cent settlement.

Mr. Baird: You have hit on a very important problem, which is the question of what is a class. Is a class a type of creditor who has the same type of security, or is a class a creditor who has exactly the same rights against a particular piece of property? I have always interpreted a class to mean that it would have to have equal rights against a particular piece of property. For example, if you have a mortgage against property A and a mortgage against property B, I do not think they should be considered to be in the same class.

Senator Flynn: They cannot be tied together.

Mr. Baird: There is nothing in the bill which gives any help in determining what is a class, and this is a real problem.

Senator Flynn: A definition should be added.

Senator Laird: Are you talking about the present Act?

Mr. Baird: No, the new bill. The new bill talks about imposing a compromise on a class of secured creditors, but does not define what a class is. The problem senator Flynn raises is very valid. If you took all mortgages and said that everyone holding a mortgage was in a particular class there would be a most unfair situation. You would have a man with very little or no security being able to impose a compromise on a creditor who has good security.

Senator Flynn: It would be in his interests to do it, too.

Mr. Baird: Oh yes.

Mr. Zwaig: Perhaps I can continue on the proceedings under the commercial arrangement. The bill proposes to codify what the debtor must include in making a proposal. The bill proposes that once a proposal, is filed and a quarantee is tendered with that proposal neither the proposal nor the guarantee can be withdrawn without the consent of the creditors and the approval of the court.

Senator Flynn: That is in the present Act.

Mr. Zwaig: It is in the present act.

Senator Laird: You said the proposal is filed with the administrator?

Mr. Zwaig: It is.

Senator Laird: Under the present act how do you go about that?

Mr. Zwaig: It is filed with the official receiver in the locality of the debtor.

Senator Cook: What clause is this?

Mr. Zwaig: Clauses 95 and 96, on pages 51 and 52.

Under clause 98, where a railway corporation which has been incorporated under the act of Parliament makes a proposal that has been ratified by the court, the provisions of the proposal have the same effect as if they have been enacted by Parliament.

Under clause 99 the bill intorduces the term "preventive arrangement." As best as can be defined with the information provided in the bill, the term seems to apply to an arrangement designed to prevent a bankruptcy. I think that is what they are talking about in terms of a preventive arrangement.

If a notice of intention has been filed there is a trustee named who would be prepared to act under the arrangement, or there might be an interim receiver named, in which case the assets would vest with him for conservatory purposes only during this period, the debtor cannot deal with or transfer or remove any of his property without the consent of that trustee or interim receiver, but he can manage his property in the normal course of business.

The Chairman: The debtor can?

Mr. Zwaig: The debtor can.

The Chairman: He can carry on business?

Mr. Zwaig: He can carry on business, that is right, but he cannot dispose of his assets during this "notice of intention" period.

The Chairman: Is he under any supervision during that period?

Mr. Zwaig: He may provide in his notice of intention for the appointment of an interim receiver, and he would be under supervision at that time. If he does not, then he has to deal with the trustee who will be handling his affairs under the arrangement.

Senator Laird: What kind of a trustee? A private individual?

Mr. Zwaig: Yes, it is a private individual.

Senator Laird: In other words, they are not suggesting the creation of more and more bureaucrats?

Mr. Zwaig: No.

Senator Laird: That is the first good point I have heard you make on that.

Mr. Zwaig: The bill also provides for a code of disclosure by the trustee named in the proposal, in that he is required to make an investigation, and he is required to report in writing to the administrator at least one clear day before the first meeting of creditors to each creditor attending that meeting of creditors.

The Chairman: Which clause is that?

Mr. Zwaig: Clause 100. The bill provides for the information that must be included in this report.

Senator Cook: When it says "the trustee . . . shall make an appraisal," I suppose that means "shall cause an appraisal to be made"?

Mr. Zwaig: I think so. The bill also provides that the meeting of creditors should be held within 30 days from the date of the filing of the proposal with the administrator, and there are certain duties, such as the sending out of notices and a copy of the proposal, and a statement of information must be sent out with the notices by this private trustee.

If there is no quorum at that meeting of creditors the proposal is deemed to be rejected, or if there is a quorum and there are insufficient votes cast in favour of acceptance of the proposal, then the proposal is deemed to be rejected.

Mr. Baird: There is no mention of a voting letter. Can you comment on that?

Mr. Zwaig: Under the present act, included with the notice that goes out to the creditors is a voting letter; in other words, the creditor, from the information he has received in the mail, and perhaps from other information he knows and has learnt from the industry, can make a decision on whether to vote for or against the proposal by mail; in other words, it is not necessary for him to attend the meeting of creditors. They seem to be doing away with this voting letter under the present bill and saying that if a creditor is to vote he must attend at that meeting of creditors, and if he does not attend and there is not a quorum the proposal is rejected. I think it might be a bit of an imposition on creditors when perhaps they are quite

distant from the locality of the debtor, and I think that voting letter should be carried forward into the new bill.

Senator Cook: Is a quorum defined?

Mr. Zwaig: Under the arrangement for the consumer debtor they seem to call a quorum one, but I cannot recall what a quorum is under a commercial arrangement.

The Chairman: The Bible has some words for it: "Wherever two or more people are gathered together—"

Senator Cook: That is the Prayer Book, not the Bible.

Senator Barrow: What are insufficient votes?

Mr. Zwaig: This is where perhaps we get into the discussion raised by Senator Flynn on the subject of voting by class. They require 75 per cent of the votes by class of secured creditors to be in favour of acceptance of the proposal. On the unsecured creditors it is the majority.

The Chairman: When you talk about voting rights and you say a creditor may for various reasons find it difficult to attend a meeting, you mean there should be a right to be able to give a proxy to another creditor?

Mr. Zwaig: A mail vote; there should be a mail vote.

The Chairman: It would not be a proxy arrangement.

Mr. Zwaig: Not necessarily.

Mr. Baird: This new bill continues the existing act, which permits a proxy to be given, but it is sometimes desirable to permit him just to vote without having to give a proxy.

The Chairman: Under the present act he could vote. Is that right?

Mr. Baird: Yes.

The Chairman: And under this bill?

Mr. Baird: He is precluded from voting by mail.

The Chairman: Yes.

Senator Buckwold: How are the votes for the creditors cast? How many votes does a creditor get? Is it related to the value of his claim or could we have the tyranny of the small creditor continuing?

Mr. Zwaig: It is one vote per $1,000.

Senator Buckwold: Thank you.

Mr. Baird: This seems an artificial way of calculating the votes. Why do we not give one vote per dollar, as being the most simple way?

Senator Lang: You cannot count that way.

The Chairman: For anyone with less than $1,000, you would have a fraction.

Mr. Baird: No. He would have one vote.

Senator Buckwold: That means that a creditor with up to $1,000 would get one vote, a creditor with up to $2,000 would get two votes.

Mr. Zwaig: If he had $1,400, he would have two votes. The proposed bill provides a list of creditors who are not able to vote for the acceptance of the proposal but may vote against the acceptance. It extends or enlarges some of the categories included in the existing act. Now, if a proposal presented to a meeting of creditors has not been accepted and there has not been a petition in bankruptcy that has been filed prior to the filing of this proposal, the effective date of the bankruptcy dates back to the date the notice of intention was filed with the administrator. So there is a continuation of what in fact is happening today if the proposal is filed and it is not accepted at a meeting of creditors. There is a statutory bankruptcy, but it is deemed to date back to the date of filing of the proposal.

Senator Buckwold: There is nothing wrong with that.

Mr. Zwaig: No, there is nothing wrong with that. Section 283(2) provides that one creditor who is entitled to vote at a meeting of creditors constitutes a quorum.

The Chairman: Hm—m.

Senator Flynn: With regard to the possibility of voting by mail, you would agree that possibly in clause 105 there should be a regulation establishing the form in which that should be done in the administration of this bill? However, that would be rather an administration matter.

Mr. Baird: The present act specifically requires the trustee to send out voting letters. That is in the act itself.

Senator Flynn: I refer to being present for the voting. I understood there was some doubt about the situation, as to the necessity to be there oneself, not voting by proxy.

Mr. Zwaig: It was not voting by proxy I was concerned about; it was the ability of a creditor to mail in his vote.

Senator Flynn: It is the same thing. When you mail in your vote you give a proxy to the trustee. He votes for you. Or you can give the proxy to someone else who would be present.

Mr. Zwaig: But you are directing by way of your voting letter that he vote for or against.

Senator Flynn: The trustee has a proxy. I would think the same system would continue under this bill. In any event, it is a matter of regulation.

Senator Barrow: Clause 283(2) says:

> one creditor entitled to vote constitutes a quorum for a meeting of creditors.

Senator Cook: That is ridiculous.

The Chairman: That is, after the first meeting?

Mr. Zwaig: No. That is the first meeting.

The Chairman: Where is that?

Mr. Zwaig: It is in clause 283(2).

Senator Macnaughton: On page 141.

Senator Flynn: It seems silly. Suppose you have only the trustee, with a proxy from all the creditors, you would not qualify.

The Chairman: That is an extraordinary situation, that one creditor can turn up at a meeting of creditors—

Senator Flynn: On the other hand, you must have a proportion of the claims, to make a decision, it seems to me.

Senator Cook: Do you?

Senator Flynn: I mean, the approval of the proposal requires, what is it, 75 per cent?

Mr. Zwaig: A majority.

Senator Flynn: A majority. So one creditor either will represent the majority—

The Chairman: He must represent the majority.

Senator Flynn: Or he would have a proxy.

The Chairman: If he has a proxy, he is still one creditor.

Senator Flynn: I am suggesting that the trustee holding a proxy, if he is not a creditor, could not constitute a quorum.

Mr. Baird: I think in that situation the trustee would be considered to be representing the creditor and therefore there would be a quorum. I think the creditor would be deemed to be present by proxy.

Mr. Zwaig: The drafters of the bill are following through on their experience that very few creditors show up at meetings. So they said that, as a result, they should reduce the quorum to the minimum number of people possible. I think their idea is reasonably fair when you are dealing with consumer wage earner bankruptcies, when not very many people are interested about the administration and showing up at a meeting of creditors.

The Chairman: But if one creditor turns up at a meeting and represents his own claim and he has proxies from half a dozen creditors, is that still one creditor, or does he not also represent the various creditors who give proxies?

Mr. Baird: Normally the reference would show that each of those creditors was also represented at the meeting. So you would have at least six or seven creditors represented at the meeting. I might point out that clause 104(3) provides:

> A proposal is accepted by the unsecured creditors to be affected by the porposal where the majority of votes cast by the unsecured creditors, regardless of class, is in favour of acceptance of the proposal.

This means that it is not a majority of creditors affected by the porposal who have to approve it, but it is a majority of the votes cast. That is the same concept at the present time. It is 75 per cent in dollar value, plus a majority in number of the votes cast, which must carry a proposal under the present act.

But now we have a change to the majority of votes cast must carry a proposal. That is a significant change, because normally you can always get the majority in number. Sometimes this is done by paying 100 cents on the dollar to all creditors of $100 dollars or less, or $1,000 or less. The practice is to offer them a fairly large proportion of their claims, if not 100 per cent. So all the little creditors will vote for the proposal, and in that way the majority is obtained. However the difficult part is always to get 75 per cent of the dollar value, because you are talking about the big claimants and they are the ones who determine whether or not the proposal will be carried.

That is now being changed to read "a majority of votes cast" which is based on the one vote per $1,000 formula. So they have made a significant change in the new bill dealing with those proposals. It is difficult to know how this will eventually work out, whether or not the large creditor will still have a large influence. He will still have more votes than the small creditor.

The Chairman: By the way, I notice in clause 104(2) that the chairman of the first meeting of creditors makes the determination as to what classes of creditors are represented at the meeting.

Mr. Baird: That is a very difficult problem.

The Chairman: I would think so.

Mr. Baird: The chairman of the meeting is likely not qualified to make that decision. It is a very difficult one.

The Chairman: But he is given statutory authority here.

Mr. Baird: You want to know ahead of time, before the meeting, what classes of creditors there are, what types of creditors may be divided into specific classes. It is too late by the time the meeting comes along to have a ruling on the point, because you must draft the proposal to envisage different classes.

Mr. Zwaig: The chairman at that meeting, Mr. Chairman, is the administrator.

Mr. Baird: Who might have no legal experience at all.

The Chairman: Well, what do you suggest?

Mr. Baird: My suggestion is that we should insert in the new bill provisions for determining what would constitute a class of creditor. There should be a definition section for what would be a class of creditor and, secondly, there should then be a provison for appeal from the decision of the chairman if the chairman rules on a point and the creditor or trustee or debtor feels differently.

The Chairman: It might become a matter of interpretation, then.

Mr. Baird: Then it becomes a legal question to be interpreted by the courts, which, I think, is where the decision should be made. There must be a power of appeal from the chairman of the meeting. I cannot pinpoint it for you at the present time, but we will look for it.

Senator Cook: Mr. Chairman, could we flag the question of quorum? I think it is dangerous to say it should be one. That may be all right, but perhaps we could flag it and come back to it.

The Chairman: All right.

Senator Flynn, if we are going to provide in the bill itself for the determination of the various classes of creditors, why should the chairman have a right at the meeting to make a determination as to the classes of creditors? Would he not then be bound by whatever the law says?

Senator Flynn: Yes, but as it is, the law says nothing.

Mr. Baird: That is a problem, sir.

The Chairman: Then clause 104 has to be excised in some way.

Mr. Baird: I think the chairman should be entitled to say into which type of class a particular creditor falls, because that is a practical situation which must apply when a creditor votes. You have to determine within which class he has the right to vote. That should be left to the chairman.

The Chairman: So there is some logic in providing for an appeal from that decision.

Senator Flynn: It would not be clear that there is an appeal under clause 388, which says:

> A person affected by a judgment of a prothonotary, clerk, master or other official of a court, other than a judge, may appeal therefrom to a single judge of the court.

It says, "other than a judge," but that does not include an administrator. An administrator is not an officer of the court.

Mr. Baird: No, he is not an officer of the court. The general provision for a review of decisions of the trustee does not include a power of the court to review a decision of the administrator. He is left untouched in that regard.

Mr. Zwaig: Perhaps there is one other area that I should touch on this morning, Mr. Chairman. This received some comment when the new bill was tabled. This is the situation where a proposal has been filed and has been turned down by the creditors, and this is in an area where it is a one-industry town. The court, upon application, shall endeavour to formulate a proposal which is acceptable both to the creditors and to the debtors where the debts of the debtor, including secured debts, exceed $1 million, and as long as this debtor has, in fact, already made a proposal which has not been accepted by the creditors and ratified by the courts. The act does not indicate who must make this application. Care, in my opinion, should be taken that the application is made either by the debtor or persons related to the debtor rather than having creditors impose a proposal on the debtor or having a local political figure or government agency impose this proposal upon the debtor.

The court may decline to formulate the proposal where the court considers it cannot prepare one that is just and equitable to the creditors generally or does not consider that the application has been made in good faith. The bill goes on to provide that the court may appoint a trustee to investigate and report back to the court, and it seems to be a type of negotiating process that ensues between the debtor and the creditors through the good offices of the court.

I think those are all the comments I wish to make this morning on commercial arrangements, Mr. Chairman.

Senator Macnaughton: Mr. Chairman, referring to the phraseology of the commentator, "local politician," is there some other word in English to describe that, because the implication there is quite severe.

Senator Flynn: I have heard of "Tammany Hall," but there is nothing comparable to that in Canada.

Senator Macnaughton: Certainly not in Quebec.

Mr. Zwaig: I am thinking in terms of the small area, the local councilmen, the mayor, and they are going off to the creditors and saying, "Will you try to formulate something?" In other words, if the industry is a necessity for an area, not only should there be negotiations going on between the debtor and the creditors but there should be an injection from interested local parties to see that the industry continues.

Senator Macnaughton: In other words, you meant a local public man.

Mr. Zwaig: Yes.

Senator Flynn: Mr. Zwaig, you say you have objection to creditors imposing an arrangement on the debtor. Why? If he does not accept, he is then simply faced with bankruptcy. That is all. Can an arrangement be worse than bankruptcy?

Mr. Zwaig: My experience has been that when creditors tend to impose proposals on debtors, if the debtor is not interested in continuing, he just drops the thing, abandons the thing, and the creditors defer their loss to a little later on.

Senator Flynn: He can always become bankrupt. I do not see any problem in the position of an arrangement upon the debtor by the creditors.

Mr. Zwaig: I think the debtor's heart has to be into it as well in order to get a just solution; otherwise it just will not work.

Senator Flynn: The creditors would have to find something that would be in practice acceptable to the debtor or otherwise he would just become bankrupt.

Mr. Zwaig: That is right.

Mr. Baird: It is a futile effort if you cannot reach agreement.

The Chairman: Now, Mr. Baird, you have some comments.

Mr. Baird: Thank you, Mr. Chairman.

The first topic I should like to deal with this morning is unenforceability and review of transfers. I think we must first look at the present law to determine what rights a trustee in bankruptcy has after bankruptcy to set aside transactions which took place prior to the date of bankruptcy. The present law is set out in section 50, subsection (6) of the Bankruptcy Act. If I may paraphrase it, it says that the trustee in bankruptcy is entitled to rely on the specific provisions of the Bankruptcy Act and also to avail himself of rights and remedies provided by provincial law which are not abrogated and superseded by the specific provisions of the Bankruptcy Act. The Bankruptcy Act gives to the trustee in bankruptcy the right to set aside transactions, if that power is given to him under the Bankruptcy Act, and also to rely on provincial statutes to set aside transactions.

For some reason the new bill does not continue this power to rely on provincial statutes. It makes no mention of the trustee in bankruptcy being entitled to rely on provincial statutes.

Senator Flynn: Is it necessary?

Mr. Baird: That is a very good point. I am not sure.

Senator Flynn: The trustee has all the rights of the debtor in a bankruptcy. The rights that he has under provincial legislation are there.

Mr. Baird: But the debtor does not have the right to set aside a fraudulent conveyance.

Senator Flynn: Under provincial legislation he has the right.

Mr. Baird: No. It is the creditor who is given the right under provincial legislation, it is not the debtor.

Senator Flynn: He acts on behalf of the creditors, generally.

Mr. Baird: That is correct; that is the concept. The trustee, representing the creditors, is given the power to set aside a fraudulent conveyance, and the most common example of a fraudulent conveyance is where a man who is in trouble transfers his house to his wife. This is the most common example that we have of a fraudulent conveyance. The difference is, of course, in time limits. You can go back six years under our provincial law to set aside the transfer of a property if you can prove that at the time the transfer was made the owner's assets were less than his liabilities.

I am throwing out for the committee the question of what is the effect of deleting this power to rely on provincial law. I am not sure. I think it should be included, because trustees have used it under the present law, and I think we should give trustees in bankruptcy as much power as we can, rather than limiting their powers.

The Chairman: You mean that there is some question in law as to whether the trustee can exercise power under a provincial statute that the debtor could exercise?

Mr. Baird: No. It is an additional power. It is a power that a debtor could not use. It is a power that can be exercised where a trustee in bankruptcy represents creditors and is given rights under the provincial law. The trustee has a better position than the debtor in some instances. If the debtor transfers his house to his wife he can never get it back. He has made a gift, and he cannot recover it. A trustee in bankruptcy, though, has the right to apply to the court to set aside the transfer of that property.

Senator Laird: Of course, I have not been in one of these bankruptcy cases for probably a hundred years, but it seems to me that I recall that if you were going into a hazardous business, even though you were completely solvent, and at that time transferred, let us say, a piece of real property to your wife, even then there was a possibility of its being set aside.

Mr. Baird: Yes. If you could prove that was the intention of the transfer, then it could be set aside. That is correct.

Senator Flynn: It would be illegal, as it was in Quebec, to make a gift between spouses.

Senator Cook: Would we be consistent if we argued that under 69(2) this act cannot abrogate or do away with the provincial statutes, and yet on the other hand put in a section, as we are proposing to do, to say that we can rely on provincial statutes? It seems to me we should have one or the other.

Mr. Baird: 69(2) is limited to commercial arrangements, and the right to set aside fraudulent transactions or, to use their terminology, to declare transactions unenforceable against the trustee, is given by Part V.

Senator Cook: I agree, but with all respect, it does not matter what part it is. If we say in one part that this act is going to go too far when it says it is going to take precedence over all provincial statutes, and in another part we expressly authorize the trustee to rely on provincial law, that is not consistent.

Senator Flynn: Will you please refresh my memory and tell me what is the wording in the present act which gives this right to the trustee?

Mr. Baird: It is section 50, subsection (6), of the present act. This provides as follows:

> (6) The provisions of this Act shall not be deemed to abrogate or supersede the substantive provisions of any other law or statute relating to property and civil rights that are not in conflict with this Act, and the trustee is entitled to avail himself of all rights and remedies provided by such law or statute as supplementary to and in addition to the rights and remedies provided by this Act.

My suggestion is that this type of provision should be inserted in the new bill to avoid any argument being raised in the future that the new bill prevents the trustee from relying on provincial law, because you have the problem of the legislature deleting this provision in the new act, and that could be used as an argument that the intention of the legislature was to deprive the trustee of the right to rely on provincial legislation.

Senator Flynn: It is doubtful, but I suppose you could ascribe this intention to the legislature.

Senator Buckwold: In this regard, does the new bill say that Bill C-60 would supersede any rights of a debtor in so far as provincial law was concerned? For example, in the province of Saskatchewan there are some statutes that protect homesteaders, or farmers, and homestead rights as we know them, in a variety of ways that are beyond the scope of the $3,000 worth of assets you are talking about, and in terms of which you cannot seize a home where a wife is living, even if it is in the bankrupt's name.

Mr. Baird: The new act does definitely endeavour to overrule provincial law.

Senator Buckwold: In that case, I cannot see it standing that way.

Senator Flynn: Even as far as unseizable property is concerned?

Mr. Baird: Yes. The way they have done it is by using a backhanded method. They have provided that if the debtor claims exemption for assets of a value of more than $3,000, he loses the benefit of the Bankruptcy Act, and his debts revive.

Senator Buckwold: Well, I think this is very bad.

Mr. Baird: That is the way it is done under the new bill. They have said that if the debtor claims, under provincial law, that assets of a value of more than $3,000 are exempt, then the debts revive, and as a result, going bankrupt has not done him any good.

Senator Laird: There again you have the problem of constitutionality, do you not?

Mr. Baird: They have just taken away the right of the debtor to use the Bankruptcy Act; they have made the Bankruptcy Act unavailable to him.

Senator Laird: And you do not think, then, that it would create a constitutional problem?

Mr. Baird: I do not think it would. I think it is most unfair, however. I think it prevents an opportunity of rehabilitation. It deprives the debtor of assets which the

province says he needs to maintain his normal standard of living, and I think that is wrong; but I do not think it is constitutionally invalid.

Senator Flynn: It would be unfair to creditors at the same time, though. If you deprive the debtor of the use of the Bankruptcy Act, you at the same time deprive the creditors of the right to seize the estate.

Mr. Baird: I do not think it goes that far, sir. I think the section revives the debts.

Senator Flynn: After what? Revives them when?

Mr. Baird: It does not say specifically.

Senator Flynn: You mean you exhaust all the provisions of the act, and then, if the debtor, say, has obtained his release, the creditors can go after him again?

Mr. Baird: Yes. That is the way I interpret it, namely, that the provisions of the Bankruptcy Act will apply. The assets vest in the trustee, the trustee will be able to distribute whatever assets are available pursuant to the provisions of the Bankruptcy Act, but the debtor will not be released from his liabilities.

Senator Flynn: So the release will not mean anything.

Mr. Baird: That is correct.

Senator Buckwold: I think it is a pretty serious situation, that involves provincial regulations and statutes. We could end up in an impossible position.

Mr. Baird: What they have done, really, is to try to provide a uniform exemption of $3,000 across the country, notwithstanding the exemptions created by provincial law.

Senator Flynn: Would you give me the reference?

Mr. Baird: Yes. It is clause 150(1) that provides for this. It is at page 94 of the orange book, and at page 73 of the bill.

Senator Cook: Did we not have an amendment to take care of that?

Mr. Baird: We intend to propose that the $3,000 ceiling be deleted entirely, and that we retain the existing law, whereby all assets exempt under provincial law are still to be exempt under the new bill.

Senator Flynn: Well, the present status is satisfactory to me.

Mr. Baird: Mr. Zwaig and I have discussed this, and we would suggest, and recommend, that we retain the existing law on that point.

Senator Cook: The committee agreed on that, did it not?

Mr. Zwaig: I think we discussed this about two meetings ago.

The Chairman: That is right.

Senator Cook: We were favourable towards it, anyhow. Let us put it that way.

Mr. Baird: That is a better way of putting it. The types of transactions the trustee in bankruptcy is entitled to set aside are fraudulent conveyances, as I discussed, and fraudulent preferences. A fraudulent preference is a transaction involving a creditor. If you use the term "preference" it means that one creditor is being preferred over another. They have defined "preference" in the new bill, and that is basically what it is. Also a trustee in bankruptcy at the present time is entitled to review a transaction and "review" has a very significant meaning. It means that a trustee must look at a transaction to determine whether the bankrupt received fair market value. If he did not, then the trustee is entitled to go to court and require the person who dealt with the bankrupt to pay to the trustee the difference between the fair market value and the actual consideration.

The Chairman: But this is something that the bankrupt did before he became bankrupt.

Mr. Baird: Yes.

The Chairman: How far back?

Mr. Baird: One year. Therefore with this concept of reviewing a transaction the trustee in bankruptcy can go back one year. Under the present law he can only review a transaction if the parties were not dealing at arm's length. If the parties were dealing at arm's length, under the present law, he has no right to review such a transaction. The clause in the bill dealing with the reviewability of transactions is clause 155 at page 77.

Senator Flynn: You said he could get the difference between the fair market value and the price he actually got?

Mr. Baird: Yes.

Senator Flynn: But can he in the alternative claim the property itself back in repaying the amount?

Mr. Baird: Not under the present law. He simply gets judgment for the difference in value.

Senator Flynn: But if he has a judgment that cannot be enforced?

Mr. Baird: Then he is lost. He has no right to trace the asset.

Senator Flynn: I thought the alternative would be provided.

Mr. Baird: It is not.

The Chairman: You favour this?

Mr. Baird: The concept of the reviewability of transactions, yes. It was inserted in 1966 when the Bankruptcy Act was amended and it has proven to be very useful. It was designed to deal with the situation where you had company A owning a piece of land and another company, company B, contracting with company A to build an apartment building. The contract would provide for the building to be built at $5,000 per suite when in fact it actually cost $15,000 per suite to build. Company B, of course, being the contracting company, would go bankrupt, and then company A in law would own the land and building for $5,000 a suite. That was going on before 1966 quite blatantly. But when the existing Bankruptcy Act was amended in 1966 this problem was corrected, and we have not seen it happen since that time. It has proved to be very useful.

The Chairman: What is the section involved under the present act?

Mr. Baird: Section 78. I have prepared a table dealing with the unenforceability and review of transactions, and it really summarizes the changes in Bill C-60 as compared with the present act. If you would care to refer to it, I shall be happy to talk about it very briefly.

Basically what the new bill does is to enlarge the situations and time-limits for attacking transactions that took place prior to the date of bankruptcy. It also goes farther and simplifies the terminology. For example, as a first item, a gift is unenforceable if the parties were dealing at arm's length and if the gift was made six months before the bankruptcy, or at any time if the donor required the property to pay his debts. Under the present law the term "settlement" is issued and that has been a very difficult term to interpret. It is one year if it is a settlement, and less than five years if the donor required the property to pay his debts. This deals with parties dealing at arm's length. In the case of parties dealing at non-arm's length, you can attack a gift if it is made within a year prior to the bankruptcy, and similarly at any time if the donor required the property to pay its debts.

Senator Cook: At any time?

Mr. Baird: Yes.

Senator Flynn: You mean, if he was insolvent at that time?

Mr. Baird: Yes, you can go back almost indefinitely.

Senator Flynn: Even if he became solvent afterwards?

Mr. Baird: No. There is a saving clause in the new bill, clause 65. It is a saving defence for any person who is subject to attack by a trustee in bankruptcy. It provides that, "Nothing in sections 154 to 164 renders unenforceable or subjects to review a transfer, payment of dividend," et cetera, "where . . . the person who subsequently became a bankrupt was solvent and able to pay his debts and was paying his debts generally as they became due" at any time after the transaction took place. This is an overall defence to any action by a trustee in bankruptcy, but it is a difficult defence for a person to use. He must prove that after the transfer was made, or after the gift, that the bankrupt was solvent. He must prove also that the bankrupt was able to pay his debts, and, further, that he was in fact paying his debts generally as they became due. In most businesses debts become due 30 days after goods or services are provided on open terms, but payments are not usually made within that 30 days, they are usually made within 45 to 60 days. So, in this case, if the debtor was paying his debts 45 days after they became due, he would not in fact be paying them as they became due and, therefore, the creditor or other person relying on this defence would not succeed.

Senator Flynn: But it is only in special cases that you would be insolvent at the time you made a gift. Then you might win the lottery and become solvent, and then you become bankrupt again. So if you were to win, then in that case you would have a good defence.

Mr. Baird: That is correct, you would have a good defence.

Dealing with reviewable transactions, under the present law there is no right in the trustee in bankruptcy to review the transactions where the parties dealt at arm's length, and the new bill provides for that if the transaction took place within three months and not in the normal course of affairs, and in six months with the intent known to both parties to impede, obstruct, delay or defraud the creditors. I would like to highlight the words "in the normal couse of affairs." This is a new term that is being inserted in the bankruptcy bill, and it is one that is not defined. It is used throughout the provisions relating to unenforceability nd review of transactions.

It is designed in most cases to replace the problem of proving an intent to prefer, which has caused a considerable amount of litigation under the existing law. The problem, in my opinion, is that jurisprudence which has developed during 50 years has been abolished, or disregarded, anda new term created. This new term will take another lengthy period of time to be interpreted by the courts and it leaves everyone very much up in the air at the present time as to what the law will be.

Senator Flynn: I believe the intention must have been to attempt to cover ordinary situations in which payment has been made during the three-month period. At the present time it is very difficult to trace all payments made by a bankrupt and claim them back from the recipients.

Mr. Baird: In my opinion, we are going from one uncertain situation to another.

Senator Flynn: Maybe, yes. Important matters would have to be singled out, rather than payments of $50.

Senator Cook: To whose affairs does the phrase "in the normal course of affairs" apply? Supposing a person sold his estate to a young fellow for $300,000, he could say that was the normal course of business for him. The clause provides if either party becomes insolvent; is he to be called upon to answer? It would be the normal course of affairs for him, but not for the young fellow, who had no business buying a $300,000 house.

Senator Flynn: It would be up to the person who received the payment to prove that the other was not preferring it in one way or another.

The Chairman: We certainly cannot relate the words "with intent to confer a benefit" to the language of "in the normal course of business." If a man made a practice of doing this sort of thing, I do not think that would necessarily make it the normal course of his business as the Bankruptcy Act intends to mean it.

Senator Cook: We encounter this type of change continually in legislation coming before us. It gets away from the established jurisprudence and introduces new terms.

The Chairman: Yes.

Senator Flynn: I wonder if our advisers have considered whether it is necessary to draft an entirely new bill? Could the purposes not be achieved by amending the present legislation? We have faced that problem, Mr. Chairman, in connection with the so-called fiscal reform, which has not achieved very much in clarifying the situation in any manner. Then we have this problem with this legislation. I think the Canada Corporations Act is a different situation, because the concept of the corporation is entirely changed. However, in this legislation we are not attempting to change the substance of the bankruptcy legislation.

The Chairman: No, a bankrupt is still a bankrupt.

Senator Flynn: It is the same thing, and by this method we would discard a great deal of jurisprudence and estab-

lished practices which have to some extent proven their worth.

Senator Cook: They have made law certain, and uncertainty is now being brought into it.

Mr. Zwaig: In my opinion, much of the intent of Bill C-60 can be achieved by amending the existing legislation.

The Chairman: At some stage when we have concluded the study of this bill—our experts could possibly carry out the first part of it—I believe we should make a list of all the changes. We should then decide how material they are to the substance of the present Bankruptcy Act. If they are material and should be incorporated, it may be that incorporating them would be the simple method of doing it. In that fashion we would not disturb the existing jurisprudence. If the bill contains matters which are not contained in the act and which we think should not be added for that reason, we would have a picture of what would be involved in amendments to the present act, as opposed to what would be involved in making Bill C-60 suitable for the purposes for which it is intended.

Senator Flynn: That would be a heavy task, but at least we could possibly declare that in our opinion it would be better to proceed by way of amendments rather than attempting to provide a bill containing those amendments which are required. In my opinion, that would be a tremendous job.

The Chairman: Yes.

Mr. Zwaig: I know that the chairman of one of the interested parties, which will be presenting a brief to this Committee, Mr. Chairman, has indicated that one of the areas which his committee is seriously discussing is proposing amendments to incorporate in the existing Act. Perhaps, with the chairman's permission, I might call him and, as an extension of what his committee is doing, prepare a report on how they will envisage the existing Act be amended to incorporate those sections that they consider would be of benefit.

The Chairman: The difficulty with a massive number of amendments is the consideration of their relationship to the provisions in the present law and whether in the overall study and interpretation they are likely to affect any of these provisions. This is the question we must consider in doing a wholesale job on the amendments. That is why in connection with the Companies Act we finally decided there was only one method of dealing with it, which was to write a new bill. I would hate to see us take that decision with respect to this legislation though.

Senator Flynn: This would be a heavier task, I susgest.

Mr. Baird: One of the problems we would face in tackling that is with respect to language. In this bill the language of unenforceability is used, whereas the old Act used the term deemed fraudulent and void as against the trustee in bankruptcy.

The Chairman: It was blunter.

Mr. Baird: Yes, but unenforceability presents a problem. It only covers half of the situation, because if it is a mortgage against a property owned by the bankrupt, that mortgage could be deemed unenforceable as against the trustee, who could sell the property free and clear of the mortgage. However, if money has already been turned over to a third party, what would be the effect of saying that transaction was unenforceable? It does not give the trustee in bankruptcy the right to recover the money.

Senator Flynn: The meaning is less clear.

Mr. Baird: Yes. In addition, this is only a technical matter, the right of tracing has been omitted. Under the old Act if a man gave a preference to a creditor by way of an asset, such as a car which was eventually sold, judgment could be obtained against the recipient of the car for its value. This type of provision has been omitted from the bill.

The Chairman: What do you think is the reason for that?

Mr. Baird: In my opinion, it is an oversight.

The Chairman: Well, we do not object to dealing with oversights, do we?

Mr. Baird: I have basically indicated to you where the changes are. In most cases the trustees have been given additional power over that which they presently have. I am concerned as to whether or not an attempt is being made to codify all the rights of a trustee in bankruptcy as contained in the Bankruptcy Act and prevent the trustee from relying on provincial legislation. I think we should ask the department, when they come before us, what their intention is as to whether or not it is intended that the trustee in bankruptcy will be able to rely on provincial legislation. It could be argued that they have codified all the rights and they do not intend the trustee to use provincial legislation.

The Chairman: There are two other headings remaining. We may not deal with both of them today. One concerns receiverships.

Mr. Baird: I prepared a paper dealing with receiverships, headed "Condensation of Provisions of Bill C-60 Related to Receiverships."

I do not think I need repeat everything that is in the paper. I will make several comments on them. A receiver in common law is appointed either by an order of the court or by an instrument in writing. The law at the present time is very vague as to what a receiver can or cannot do. It relies on decided cases. There is no codification of the law related to receivers and it is rather haphazard with regard to the relationship between a receiver and a trustee in bankruptcy. Therefore it is desirable to insert in the Bankruptcy Act some privisions dealing with the right of a receiver, vis-à-vis creditors and vis-à-vis the trustee in bankruptcy. So the concept of a special provision relating to receiverships is a good one. The problem is that they have given the court many powers relating to receivers, but they have not given the court any guidelines or principles which it must follow in exercising its discretion. It has given the court almost unlimited power to control receivers without providing any principles.

The Chairman: When you are talking about inserting statutory guidelines, it could be done in a bill of this kind. Illustrate the sort of guidelines you are thinking about.

Mr. Baird: Should there be a meeting of creditors called when the assets clearly will be insufficient to satisfy the claims of ordinary creditors? Should all the powers given to the court be exercised if it is quite clear, and it is established to the court, that there will be insufficient funds available to pay any claims of ordinary creditors? If

the assets will be insufficient to satisfy the debt owing to the secured creditor, should the court still be given the power to order a meeting of creditors? Should we not limit some of the powers of the court to situations where it appears to the court that there might be a surplus available for the ordinary creditor, or in a situation where there might be doubt?

The Chairman: It would appear to be sensible, otherwise you might be going through a lot of motions.

Mr. Baird: That is my concern. They have given the court a tremendous number of powers which might prove to be a waste of time in view of the fact that the assets are insufficient to pay the debt of the secured creditor.

Senator Flynn: Can the court intervene without an application being made, either by a receiver or creditor, or any other interested party?

Mr. Baird: Not under the present bill, no. It requires an application by an interested party. The court cannot intervene on its own initiative.

Senator Flynn: Why should we fear the powers given to the court, if they cannot be exercised unless an application is made?

The Chairman: If you still required an application to motivate the court, or put the court into action, you could still make a general negative provision that the court shall not exercise its powers in this circumstance, or in these circumstances, if it appears there is nothing to divide between the receivers' position and the general body of creditors.

Senator Flynn: Do you not think that conclusion is obvious?

The Chairman: It should be obvious, but the question is whether the wording of the bill is too general.

Senator Cook: The main point is, who is going to pay the costs? The ordinary creditor has the right to apply to the court, and the costs will come out of the estate.

Senator Flynn: In a case like that, the application has no value.

Mr. Baird: In the new bill relating to the power of a court to postpone a realization by a secured creditor, it is provided under clause 242 that a court may impose such a stay upon realization if the postponement does not cause unreasonable hardship on the secured creditor and no payment on account for principal, interest or other charges is in arrears for more than six months. That is a power given under clause 242 of the new bill. It is not transferred to the provisions dealing with receiverships.

Senator Flynn: That is in the present legislation.

Mr. Baird: Basically that is how the present legislation is being interpreted. But this type of provision has not been brought into the provisions relating to receiverships. They have not provided for a similar type of provision relating to receiverships.

The Chairman: And you think they should?

Mr. Baird: I think they should.

The Chairman: Have you any answer to that, Senator Flynn?

Senator Flynn: If you provide powers, they have to be exercised on the basis of facts. Perhaps it would be a good thing to relate the power of the courts regarding receiverships to this part of the problem; but it seems to me it could be quite clear that under the provisions concerning receiverships you should apply the same rule as you do under ordinary bankruptcy.

The Chairman: Or you could make the receivership provisions subject to clause 242.

Senator Flynn: That would be clearer. But if you have to do that in every case, imagine the difficulty in drafting. If you do it for that, you may have to do it for many other provisions.

The Chairman: Yes.

Mr. Baird: I have a concern that once you give the court power to do something, the court will consider that to be the normal thing to be done in each receivership rather than perhaps the exceptional thing that should be done in a particular case. I am really thinking of the problem of calling meetings of creditors, setting up committees of creditors, or other matters that will take time and cause expense. We are only guessing. We do not know what the court will do with these powers. Will the court say in every case "We should have a meeting of creditors," or will it say "We will have a meeting of creditors only if it appears worthwhile and that there is something available for distribution among ordinary creditors"?

Senator Flynn: You could possibly qualify these powers with a general rule and say, "If it is deemed advisable," or something like that.

The Chairman: I would suggest that Mr. Baird apply his thinking in seeing what sort of provision or provisions should be inserted. We will then decide whether they are needed and whether they go far enough or too far.

Mr. Baird: That is fine, Mr. Chairman.

The other matter I was hoping to reach today concerns the courts and their powers.

The Chairman: We have distributed to the members of the committee your memorandum.

Mr. Baird: Yes, Mr. Chairman—regarding the transfer of functions of the present Registrar in Bankruptcy. There are only two significant changes in the new bill dealing with the powers of the court. The most significant one is that which abolishes the position of the present Registrar in Bankruptcy. In order to ascertain the effect of this provision, I have prepared a table showing the present functions of the Registrar in Bankruptcy, and who will perform those functions in the province of Ontario.

It has been suggested that the Superintendent of Bankruptcy and the administrator would take over all the functions of the present registrar. If you analyze the situation you will see that that is not the case. A great many functions will be given to a judge of the supreme court of the province, and in some cases, many matters will be left to be heard in the normal course of civil proceedings.

In my submission, this is a very undesirable result because of the time delay in having the matter heard and the issues determined. Bankruptcy, in most cases, is an urgent situation, and we need prompt attention to matters which come before the court.

The Chairman: That is one point, and we could deal with it effectively if we restored the provision as it is in the present act.

Mr. Baird: Yes.

The Chairman: The other point is the replacing of the registrar by the administrator and, in some instances, I think, giving the power that the registrar had to the receiver or trustee—

Mr. Baird: No, the new legislation would not take the power of the registrar and give it to the trustee in bankruptcy. In most cases, it goes either to a judge of the supreme court or to the administrator.

The Chairman: Yes.

Senator Flynn: Would you say that in general the administrator replaces the receiver and the registrar?

Mr. Baird: Yes, he replaces the Official Receiver, the registrar, and also certain of the functions of the trustee—very minor functions. The administrator, however, can be appointed trustee wherever no trustee is appointed under Part V. This could be a big gap. It is uncertain as to when no trustee will be appointed under Part V. If it is a voluntary petition in bankruptcy, it is the administrator who appoints the trustee. If he does not appoint a trustee, then he himself could act. It is left completely open as to when the administrator can act as a trustee in bakruptcy and when he cannot.

The Chairman: The administrator has that discretion.

Mr. Baird: Yes, and it is a decision which is not subject to review by the court or any other judicial body.

The Chairman: What percentage of the functions of the administrator under the new bill are without provision for appeal?

Mr. Baird: The major one is the power of the administrator to appoint the trustee. I can find no power of the court to review a decision of the administrator.

The decisions of the trustee are subject to review by the court, and any decisions of the court are subject to appeal to the court of appeal, subject to certain monetary restrictions.

The Chairman: The administrator must be responsible to someone. To whom does the administrator report?

Mr. Baird: He is employed by the Superintendent of Bankruptcy. Senator Flynn is correct in that one the question of taxing accounts there is a right to appeal, if it is in respect of legal costs, to the superintendent and then to the court, and if it involves the taxing of the fees of the trustee or accountant, there is the right of appeal to the court. So, there is the right of appeal from the decision of the administrator with respect to those two matters.

Senator Flynn: That is, when he acts as an official of the court. You may recall that I referred earlier to clause 388, which states:

> A person affected by a judgment of a prothonotary, clerk, master or other official of a court, other than a judge, may appeal therefrom to a single judge of the court.

Mr. Baird: I do not think an administrator would ever be classified as an official of the court.

Senator Flynn: That is what I wanted to clarify. Earlier we said that he was not an official of the court. If he takes over some of the duties of the registrar, it seems to me that in that respect he would be an officer of the court. There seems to be some doubt in that respect.

Mr. Baird: He will not physically be within the confines of a court. He will operate out of a separate office. He will not be signing orders of the court. He will be making no court orders, and nothing in the normal function of a court would involve the administrator.

Senator Flynn: What you are saying is that all of the court functions of the registrar have been transferred to a judge of the supreme court of the province.

Mr. Baird: Yes, all court functions have been transferred to a judge of the supreme court.

Senator Flynn: and you object to that because you say it would take more time to deal with these matters. There is no doubt about that.

Mr. Baird: Yes.

The Chairman: Mr. Baird, in Ontario, for instance, there is a taxing officer who deals generally with lawyers' accounts in the range of court proceedings, and those tariffs are fixed by a committee of judges. There is also a taxing officer who can tax accounts according to the tariff and who can also enlarge the amounts if the fact so warrant.

Mr. Baird: That is correct, yes.

The Chairman: Under clause 38, if the administrator takes over the function of taxing a solicitor's account, he shall have regard to any applicable tariff. I take it, "any applicable tariff" would be a tariff such as the scale of fees that might be provided by the committee of judges in Ontario under the Judicature Act, which varies from time to time.

Senator Flynn: I think the tariff is to be established under the act, Mr. Chairman. The present tariff is established under the act.

The Chairman: What does the word "applicable" mean, then?

Senator Flynn: It would be the one applicable.

Mr. Baird: There is a very good possibility that there will be a tariff established by regulation under the act.

Senator Flynn: Yes. I believe there is reference to that in the bill.

Mr. Baird: I would think the applicable tariff might also be the local tariff established by the judges of the supreme court as well. As to which one is applicable, there might be some conflict. It if difficult to determine.

The Chairman: I would hope there would be no conflict with some of the provisions of the proposed competition bill, Senator Flynn.

Senator Flynn: No, unless they accept our amendments.

The Chairman: If they accept our amendments, there will be no problem.

Mr. Baird: The problem is whether taxing costs is an administrative function or a judicial function. In the back-

ground paper, it is stated that the intention of the new bill is to transfer the administrative functions to the administrator and to leave the judicial functions to the court. It is my opinion that taxing costs if a judicial function and should be left to an officer of the court. It is also my opinion that the fixing of the remuneration of the trustee is a judicial function and one which should be left to an officer of the court.

It is a question of categorizing a particular function as to whether it is administrative or judicial. The major problem in the new bill, as I see it, is the fact that it abolishes the office of a person who is familiar with the Bankruptcy Act and who can handle matters promptly, providing the trustee and the lawyers dealing in bankruptcy matters with prompt attention and quick action, which is needed in a bankruptcy situation.

The Chairman: What makes you think that the administrator would not function as quickly and expeditiously as the registrar does under the present act?

Mr. Baird: I am really referring to the judicial functions that have been transferred to a judge of the supreme court—the judicial functions transferred from the registrar to a judge of the supreme court. In Toronto at the present time, for example, one has to wait two years or more to get a non-jury matter heard. It we are left with a situation where every time there is a disallowance of a claim in a bankruptcy and it becomes necessary to have the matter heard by a judge of the supreme court, the administration of bankruptcy proceedings will be delayed.

Whether or not the administrator will be able to act as expeditiously as the court depends on the amount of staff involved and the number of responsibilities imposed upon him. It is very difficult to know now whether he will be able to act as expeditiously as the court. We have a court that acts promptly at the present time and, in my submission, it is wrong to abolish something that is working effectively.

The Chairman: The registrar under the present law is an officer or official of the bankruptcy division, say, of the Supreme Court of Ontario?

Mr. Baird: Yes.

The Chairman: And the administrator under this bill is not so described and is not given that kind of authority that the registrar presently has in his relationship to the judge, to whom he may refer matters that come before him.

Mr. Baird: That is correct. The registrar has the right to refer matters to the judge, whereas the administrator under the new bill would not have that power.

The Chairman: It might be a good power to have. If the administrator were given that power, it would need to be intelligently exercised.

The concept of administrator, I take it, does not involve the qualifications of the registrar under the present act. Under the present act does the registrar have to be a lawyer?

Mr. Baird: No. At the present time the registrar is appointed by the provincial government. I do not think there is a requirement that he must be a lawyer, but in practice most registrars are lawyers.

The Chairman: It makes sense.

Mr. Baird: He is hearing and deciding on matters of law; he is hearing applications dealing with claims, whether or not a claim should be allowed; he is hearing a reference from a judge; he is making judicial decisions.

The Chairman: Maybe we should require the administrators to be lawyers and relate the duties of the administrator in relation to the judge, the same as you now have the duties of the registrar referable to the judge.

Mr. Baird: This would alleviate our concern about the qualifications of the administrator.

Senator Flynn: It would not solve your problem. The administrator has no powers given to him that are taken away from the registrar.

Mr. Baird: He has certain of the registrar's powers transferred to him, but only some.

Senator Flynn: Administrative but not judicial.

Mr. Baird: That is correct.

Senator Flynn: Or with reference to court operations. It seems to me that what you are trying to say is that the present system, where we have the bankruptcy divisions of our supreme or superior courts and a registrar who is an employee of the court, who sometimes has other duties, is a good system that should be retained.

Mr. Baird: That is exactly my submission.

Senator Cook: Plus using somewhat the same terms where we can instead of changing the language, which would sort of encourage applications.

Mr. Baird: Where we could rely on the established jurisprudence we would be better off.

The Chairman: I think I told you the other day the explanation given by one of the departmental officials concerned with this bill. The registrar has to be removed in order to accommodate the administrator, and in any event with the registrar there is a duplication of work that the registrar does as against what the Superintendent's office has to do. This is beyond me. I just cannot understand it, but this was a serious explanation to reduce costs.

Senator Flynn: I cannot see it. I never considered the function of the registrar as a very important one in any event. It is a very useful one but not important.

The Chairman: Very useful.

Senator Flynn: But not important.

Mr. Baird: He has the right to make minor judicial decisions.

Senator Flynn: That is right.

Mr. Baird: It is this type of power that oils the wheels of bankruptcy administration.

Senator Cook: According to the established practice.

Mr. Baird: Yes.

That completes my summary of the courts and matters that I have prepared for today.

The Chairman: I told you when I opened the meeting this morning that another meeting of this duration would, I think, take us through all the other provisions of the bill.

Whether we will have this meeting in the near future depends upon whether the summer recess intervenes. Ordinarily we would meet next Wednesday.

Senator Cook: As much as I love meeting, I hope the summer recess intervenes.

The Chairman: There may be a lot of people who think that.

Senator Flynn: It looks promising maybe for the end of next week, but certainly not this week.

The Chairman: No, not this week. We are proposing to have a meeting on Wednesday if the summer recess does not occur in the meantime.

Senator Flynn: The "if" is unnecessary, I am quite sure.

The Chairman: Is that satisfactory to the committee?

Hon. Senators: Agreed.

The Chairman: Then we will adjourn, and if Parliament is still in session next Wednesday we will contemplate sitting. You will be given due notice.

The Committee adjourned.

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FIRST SESSION—THIRTIETH PARLIAMENT
1974-75

THE SENATE OF CANADA

PROCEEDINGS OF THE

STANDING SENATE COMMITTEE ON

BANKING, TRADE AND COMMERCE

The Honourable SALTER A. HAYDEN, *Chairman*

Issue No. 49

WEDNESDAY, JULY 16, 1975

Sixth Proceedings on:

"The *Subject-Matter* of Bill C-60, Bankruptcy Act, 1975"

(Witnesses: See Minutes of Proceedings)

29416—1

THE STANDING SENATE COMMITTEE ON BANKING, TRADE AND COMMERCE

The Honourable Salter A. Hayden, *Chairman*

The Honourable Senators:

Barrow	Hayden
Beaubien	Hays
Buckwold	Laird
Connolly (*Ottawa West*)	Lang
Cook	Macdonald (*Cape Breton*)
Desruisseaux	Macnaughton
Everett	McIlraith
*Flynn	Molson
Gélinas	*Perrault
Haig	Sullivan
	Walker—(19)

**Ex officio* members

(Quorum 5)

Order of Reference

Extract from the Minutes of the Proceedings of the Senate, May 13, 1975.

"The Honourable Senator Hayden moved, seconded by the Honourable Senator Bourget, P.C.:

That the Standing Senate Committee on Banking, Trade and Commerce be authorized to examine and report upon the subject-matter of the Bill C-60, intituled: "An Act respecting bankruptcy and insolvency", in advance of the said Bill coming before the Senate, or any matter relating thereto; and

That the Committee have power to engage the services of such counsel, staff and technical advisers as may be necessary for the purpose of the said examination.

After debate, and—
The question being put on the motion, it was—
Resolved in the affirmative."

Robert Fortier,
Clerk of the Senate.

Minutes of Proceedings

Wednesday, July 16, 1975
(64)

Pursuant to adjournment and notice the Standing Senate Committee on Banking, Trade and Commerce met this day at 9:30 a.m.

SUBJECT: Subject-matter of Bill C-60-Bankruptcy Act, 1975.

Present: The Honourable Senators Hayden, (*Chairman*), Barrow, Buckwold, Connolly (*Ottawa West*), Cook, Flynn, Haig, Laird, Macnaughton and McIlraith. (10)

In Attendance: Mr. David E. Baird and Mr. Melvin C. Zwaig, Advisers to the Committee.

The Committee *resumed* its examination and analysis of the subject-matter of the above Bill, with the assistance of the advisory staff.

At 11.20 a.m. the Committee proceeded to the next order of business.

Wednesday, July 16, 1975.
(66)

At 12 *Noon* the Committee *resumed* its consideration of the above subject-matter.

At 12.20 p.m. the Committee adjourned to the call of the Chairman.

ATTEST:

Frank A. Jackson,
Clerk of the Committee.

The Standing Senate Committee on Banking, Trade and Commerce

Evidence

Ottawa, Wednesday, July 16, 1975

The Standing Senate Committee on Banking, Trade and Commerce met this day at 9.30 a.m. to consider the subject matter of Bill C-60, respecting bankruptcy and insolvency.

Senator Salter A. Hayden (*Chairman*) in the Chair.

The Chairman: Honourable senators, we are going to commence this morning by resuming our study of the bankruptcy bill, and then at approximately 11.30 a.m. we will start to deal with Bill C-57, to amend the Federal-Provincial Fiscal Arrangements Act, 1972.

You have before you this morning, honourable senators, a bound volume which contains the subject matter of what our expert advisers are going to talk about this morning. I might add at this time that we have now compiled all the pieces of paper that you have received at various times during our hearings into one bound volume which will be available certainly by tomorrow, so that you can, if you so wish, throw away the various pieces of paper that you have collected. So all you need at the present time is the bound volume, plus today's take, plus the bankruptcy bill in concise form which has already been distributed, so your kit, if I may call it that, is now reduced to very reasonable proportions.

This morning we are going to deal with the first item, which is voluntary and involuntary bankruptcy, and Mr. Baird will deal with that.

Mr. David Baird, Adviser to the Committee: Mr. Chairman and honourable senators, I would like to highlight for you the provisions dealing with the method whereby a debtor who is insolvent goes bankrupt voluntarily. The provisions do not differ substantially from the provisions in the old Bankruptcy Act. Basically, a person who is insolvent has the right to file an assignment, which is now called a petition, and when the petition is properly filled out it is filed with the administrator. Under the present Bankruptcy Act it is filed with the official receiver. The administrator is then required to select a trustee, with reference to the wishes of the most interested creditors. This is the same provision as that in the existing Bankruptcy Act.

The problem, and the only problem that seems to arise out of this provision, is this: Who should be the trustee? The background papers that have been published by the department have indicated that the administrator will act as trustee for consumer debtor bankruptcies and may act as trustee for commercial bankruptcies.

Senator Connolly: What do you mean by "consumer debtor bankruptcies"?

Mr. Baird: That is not clear. Consumer debtors have been defined for the purpose of making arrangements, and they have been defined as being debtors who are not in business and have any amount of debt. If the debtor is in business, his debts cannot exceed $10,000. A businessman with debts of less than $10,000 and a person who has not been in business come within the definition of consumer debtors for the purpose of making an extension arrangement or composition arrangement. In the rest of the act there is no definition of consumer debtor.

Senator Connolly: So that there is a ceiling on the amount of debt, is there?

Mr. Baird: Only for a businessman. If an individual has liabilities of $100,000, he could make an extension arrangement or composition arrangement. This is found in Part III of the Bankruptcy Act. At page 68 of the orange book, clause 63(1) defines a debtor as:

> (a) an individual who is insolvent or unable to pay his debts but does not include such an individual who
>
> (i) carries on business on his own account, and
>
> (ii) has debts exceeding ten thousand dollars or such greater amount as may be prescribed,—

Senator Flynn: However, as far as voluntary petitions are concerned, what difference is there between the consumer debtor and the other?

Mr. Baird: There is none; the same procedure is applicable.

Senator Flynn: I mean, would the administrator act as trustee when none is suggested by the creditors, or by the debtor himself?

Mr. Baird: That is the main problem; we do not know. The bill, as drafted, does not set out provisions as to when the administrator should act as trustee in a voluntary petition and when he should not. I would presume, and only presume, that he would only act as trustee if no private trustee were willing to act.

Senator Flynn: When do the public trustees act, those employed and paid by the department? What does this legislation provide as to when they would act?

Mr. Baird: They act if no trustee is appointed under Part V.

Senator Flynn: Is that regardless of the amount involved in the estate of the debtor?

Mr. Baird: There is no limitation at all.

Senator Flynn: There are presently limitations.

Mr. Baird: There are limitations at the present time, that is correct.

Senator Flynn: But they will disappear?

Mr. Baird: They disappear completely; there are no provisions in the bill limiting the scope or role of the federal trustee, or the administrator who now comes and fills the role performed by the federal trustee at the present time.

The Chairman: I thought I saw a suggestion somewhere that the administrator would be available to act as the trustee in cases in which no other person would take on the job; in other words, if there were insufficient money to support the retainer of a trustee. Is that correct?

Mr. Baird: That suggestion is contained in the background paper prepared by the department, but the bill does not state it in that fashion. It states that the administrator can act as trustee if no trustee is appointed under Part V. The problem is, of course, that it is the administrator who has the right to make the appointment under Part V.

Senator Connolly: You are telling us, I gather, that up to the time of the filing of the position under the bill the assets of the estate are vested in the bankrupt and at the moment of the filing of the petition, or whenever the petition is accepted, I suppose, those assets become vested in the administrator and they remain so vested. At least, this is the legal position which should emerge and, I should think, the position that you would desire to see emerge. If the administrator takes action to have a trustee appointed, once the trustee is appointed he is vested with the assets and the administrator is divested, is that so?

Senator Flynn: No.

The Chairman: No.

Mr. Baird: The section does not specifically provide for that.

Senator Connolly: Well, perhaps it should.

Senator Flynn: Perhaps, but that is not what it provides.

Mr. Melvin C. Zwaig, C.A., Adviser to the Committee: In cases where the trustee is a private trustee, the appointment should be made directly with the filing of this petition. Therefore, the steps of having the assets vested with the administrator, then divesting the administrator and vesting again with the trustee would be saved. Therefore, if the individual meets the criterion that the administrator is a trustee, the assets would vest directly with the administrator. If, in fact, he does not meet that criterion, the assets should vest directly with the trustee at the time of the voluntary petition.

Senator Flynn: The solution, as I would see it, is close to that suggested by Senator Connolly, if section 25 were to provide that an administrator would become a trustee of an estate in the event that no trustee is appointed. That is not mentionned under Part V. For instance, if the petitioner or the creditors did not suggest a trustee, the administrator would become the trustee of the estate automatically, subject to being replaced later on if the mechanics for that were provided.

The Chairman: Is there a provision in the bill that in the case of vesting in the administrator and the subsequent appointment of a trustee there would be statutory revesting of the assets in the trustee?

Senator Flynn: A trustee replacing another trustee, or the administrator, is the same thing.

Mr. Baird: There is an automatic turnover or vesting of the assets.

Mr. Zwaig: I believe an attempt is being made to get away from the problem under the existing Bankruptcy Act, in which section 31.(5) provides:

> Where the official receiver is unable to find a licensed trustee who is willing to act, he shall, after giving the bankrupt seven days notice of his intention, cancel the assignment.

Senator Flynn: That is the present legislation.

Mr. Zwaig: That is the present provision, and the object of the new legislation is to get away from the position that someone who is insolvent should have the option of going bankrupt and should be directed to the administrator.

Senator Laird: From your experience, would this provision in the bill fill some void that exists under the present legislation and would, therefore, represent one good feature of this bill?

Mr. Zwaig: Yes.

Senator Flynn: Partly.

Mr. Baird: I agree with Senator Flynn; there is a need for the public trustee to act if no private trustee is available. However, that is not provided; the bill simply provides that the administrator acts if no trustee is appointed and gives the administrator the power to make the appointment. In my opinion, circumstances in which the administrator should appoint a private trustee should be spelled out. If he has canvassed the creditors and other private trustees and cannot find a private trustee to act, he should be compelled to act.

Senator Laird: Right. That also brings up the broader question of this administrator, as to whether he should exist at all. In other words, the present system is working reasonably adequately and we know from our studies that it is proposed to vest very wide powers in this administrator to do all sorts of things. Somehow at this point in time I do not like that, speaking purely personally. What is your reaction?

Mr. Baird: There is no question that the administrator has much breader powers than the official receiver has at the present time. In my opinion, it goes further than necessary, and I think those powers should be spelled out in the act itself, through the bill. The administrator should be entitled to act as the trustee when a private trustee is not available.

Senator Laird: That should be spelled out.

Mr. Baird: That is correct.

Senator Connolly: I am probably wrong, but I wonder whether the fundamental question is the problem of vesting. We must consider third party rights, and if any part of the bankrupt estate is to be transferred by a trustee, the administrator or an appointed trustee to a third party, which would involve the question of title to securities, land and any other part of the estate, we must make sure of the chain of title. Should the act provide for vesting along the way and divesting, if necessary, or is that a matter to be left to the interpretation of the court? It seems to me that it would be much easier to provide for that in the legislation than to have to go constantly to the court to clear up problems of title.

The Chairman: Mr. Baird has answered that question; that is, where a trustee succeeds an administrator—

Senator Flynn: Or another trustee.

The Chairman: . . . the assets just move across.

Senator Connolly: Yes, I realize that, Mr. Chairman; I realize that Mr. Baird said that, but should we consider the point as to whether there should be a provision for vesting in the administrator and divesting and revesting in the trustee to be appointed, simply to make sure that the third party—

The Chairman: There is a provision of that kind. Mr. Baird is looking for it.

Senator Connolly: It seems to me to be an important point.

Senator Flynn: Your point is, from the administrator to the trustee. If the administrator is the trustee, there is a provision saying that if a trustee succeeds another trustee, it is vested in the new trustee.

Mr. Baird: You might look at clause 290(1). It is at page 143 of the orange book.

Senator Flynn: It says:

> The property of an estate, upon the substitution of one trustee for another, passes to and vests in the new trustee without the necessity of any transfer.

That is quite clear.

Mr. Zwaig: That is a situation where the trustee is the administrator. The trustee is subsequently appointed and the assets move from one trustee to another.

Senator Flynn: Yes. The only point to be made here is to provide for the appointment of the administrator as trustee not only when there is no trustee under Part V but when they do not find a trustee right away. That would clear up the point you made.

Mr. Baird: Yes, it would; it would solve our problem.

Senator Connolly: Mr. Chairman, clause 290(2) requires the former trustee to deliver to the new trustee. Are they talking about possession when they use the word "deliver"? Does it go as far as vesting the title as ownership? In the case of personal property, perhaps, but in the case of real estate, is it a vesting?

Senator Flynn: Yes. The only problem would be to register the name of the new trustee.

Mr. Baird: I think subclause 1 of clause 290 would be your vesting clause. You are quite correct that subclause 2 provides for physical delivery. You have both the legal vesting of title in subclause 1 and physical delivery in subclause 2.

Senator Connolly: The word "vest" is used there. That is okay.

Mr. Baird: The only other matter I would like to mention is with respect to the type of claim that is admissible in bankruptcy. It is my opinion that the definition of a claim which is admissible is too limited. It is clause 144.

At the present time a claim admissible in bankruptcy includes a liability of a bankrupt arising out of an obligation incurred before the date of bankruptcy, even though it is not due or payable at the date of bankruptcy, provided that the obligation arose prior to the date of bankruptcy.

An example I am thinking of is the case where the bankrupt contracted with a third party to provide services. No services were rendered, no account was ever submitted, but the third party had done a lot of work in order to prepare for rendering the services and would have a claim for damages. I do not think that type of obligation is covered by the present definition under clause 144.

Senator Laird: In other words, contingent?

Mr. Baird: That is right.

Senator Flynn: Do they say whether or not the debt is liquidated?

Mr. Baird: There must be a debt.

Senator Flynn: An unliquidated debt would be your case.

Mr. Baird: Would there be a debt at that point in time? Is there a debt in existence? That is what I am concerned about.

The Chairman: You are asking: Is a claim for damages a debt?

Senator Flynn: Yes. But if there is no responsibility at the time of the bankruptcy, you cannot have a claim.

Mr. Baird: That is correct. There has to be some form of legal obligation.

Senator Flynn: The obligation, at least in principle, has arisen.

Mr. Baird: I am concerned about the situation where debt and obligation do not mean the same thing.

Senator Flynn: As long as you fulfill your obligation, there is no debt.

Mr. Baird: Therefore, there might not be a debt at that time.

The Chairman: Then the claim for damages would not be a debt.

Senator Flynn: Have you a case in point?

Mr. Baird: I am referring back to the existing act, section 95, which goes further than the present definition and includes the words "obligation incurred prior to the date of bankruptcy."

This section has been interpreted to cover the situation I mentioned, the situation of a contract entered into prior to the date of bankruptcy although no debt has arisen. The claim arises because of the breach of that contract. The trustee in bankruptcy has a right, if he wishes, to carry on and continue the obligation.

Senator Flynn: That would be something else; that would be a breach attributable to the trustee.

Mr. Baird: If the trustee determined that he would carry on the contract.

Senator Flynn: It would be an obligation that would rank ahead of the obligations of the claims admissible.

Mr. Baird: But if the trustee decided not to carry out the contract—

Senator Flynn: He would be the one making the decision not to, and he would be the one entering the obligations.

The Chairman: Do you not think the provision in the present act should be carried into this one?

Senator Flynn: If you want to be on the safe side, of course.

Mr. Baird: That is really what I am aiming at: to make sure there is the broadest possible interpretation of the type of liability that would be included.

Senator Flynn: Yes, just in case.

The Chairman: Make a note of that.

Mr. Baird: That concludes my discussion of the provisions dealing with the voluntary petition.

The Chairman: We move now to involuntary petitions.

Mr. Baird: The involuntary petition has changed greatly in form. Provisions dealing with involuntary petitions commence at clause 128, at page 65 of the bill. Although they have changed in form, they have not changed significantly in substance. At the present time in order to file a petition in bankruptcy you have to prove there is an unsecured debt of $1,000 owing to the petitioning creditor, and also that the debtor has committed an act of bankruptcy. The existing Bankruptcy Act sets out the acts of bankruptcies. The bill discards the concept of acts of bankruptcy and provides that you only have to prove, in the new bill, that the debtor is insolvent or unable to pay his debts. This is a simplification of the present act and is, I think, an improvement.

Under the present act, the act of bankruptcy used most commonly is failing to meet liabilities just as they fall due, which is basically insolvency or failing to pay his debts. They have incorporated that as being the sole ground for supporting the bankruptcy petition. If you are a secured creditor and you wish to file a petition, you must value your security and have an unsecured debt of at least $1,000. There is no change.

There is a change in clause 130. It provides that the Attorney General of Canada or of a province may file a petition if the department or agency of the Government of Canada or a province exercises a regulatory or supervisory function in respect of the financial condition of the debtor. This is a change, giving a government officer the right to file a petition in bankruptcy.

Senator Flynn: They did not have that?

Mr. Baird: They did not have it in the existing Bankruptcy Act, although the Crown would be a creditor. If they had a claim for income tax arrears they would be a creditor within the existing Bankruptcy Act.

Senator Flynn: They now have to be a creditor?

Mr. Baird: No, they do not have to be a creditor now.

Senator Flynn: There has to be an insolvency.

Mr. Baird: Yes, there has to be an insolvency.

Mr. Zwaig: They have to be aware of an insolvency. A case in point was the Prudential Insurance case in Ontario, where apparently the provincial Superintendent of Insurance was aware of the financial problems well before the public became aware, and he was powerless to do anything for about 18 months. There was just no jurisdiction under which he could put the company into receivership. This legislation is an attempt to deal with that problem.

Mr. Baird: Clause 131 provides that if a corporation is being liquidated or dissolved, the petition may be filed by an interested person, if the debtor is insolvent. This is a very broad provision. It gives an interested person the right to file a petition if the corporation is being liquidated or dissolved. It is my opinion that the words "interested person" are too broad. I think one must show some contractual relationship, or at least a statutory obligation to be concerned with the affairs of a company or a debtor, before that person is given the right to file a petition in bankruptcy.

There is also a provision that if the company is in liquidation or being dissolved and the corporation is insolvent, the liquidator must file a petition in bankruptcy. This is a new provision. At the present time, if a company is in liquidation, a voluntary winding-up procedure, either under the provincial statute or under the Winding-up Act, those proceedings continue unless a creditor comes along and files a petition in bankruptcy against the debtor. Under the new legislation, the liquidator is required to file a petition and the estate is administrated under the Bankruptcy Act.

The Chairman: How would you define "interested person"?

Mr. Baird: The act of filing a petition would make the individual an interested person.

The Chairman: It states in clause 131 that "a petition . . . may be filed by any interested person, where the corporation is insolvent".

Senator Cook: Would he not be creating an interest in the petition?

Senator Flynn: A shareholder would be an interested person.

The Chairman: A shareholder, as such, surely would not be entitled to file a petition.

Senator Flynn: Why not?

Mr. Baird: Within this wording, a shareholder could file a petition.

Senator Flynn: He ranks at the end of the line, but he would have a claim.

The Chairman: A shareholder would be an interested person, yes.

Senator Flynn: He may not get anything, but then again he may.

The Chairman: The question is whether the term "interested person" should be defined or not.

Senator Flynn: I do not think it is necessary to define it.

The Chairman: I think there would be difficulties in defining the term "interested person." I would be inclined to leave it as it is.

Mr. Baird: If the company is in liquidation and is insolvent and the liquidator does not file a petition, he is penalized. He is not entitled to remuneration for services rendered during the period he should have filed a petition. He is also personally liable to the creditors for any loss occasioned by his failure to comply with the filing of the petition.

This is a fairly onerous provision, particularly when the determination as to whether or not a company is insolvent is sometimes a very difficult one. The example I am thinking of is a company for which I acted that went into voluntary liquidation under the Business Corporations Act of Ontario. It had a very large claim against a company for work done in respect of the building of a hotel. The owner of the hotel refused to pay. A mechanics' lien was filed and they went to court. It took six weeks at trial. The claim in the mechanics' lien action was over $500,000. Eventually, the liquidator was successful. He recovered 90 per cent of the claim. As a result, the company was not insolvent; it had sufficient assets available to pay the creditors in full. However, when I was first brought into the picture I would have wagered that the company was insolvent.

It is common when a large claim is filed by a liquidator. You find out in the ensuing court action that the work was not done properly and the claim is not upheld. In this case, the claim was upheld.

In that situation, should the liquidator have been forced to file a petition prior to the determination of the court case? There is no question that the company was insolvent at the time.

Senator Flynn: Insolvency means the impossibility of paying right then and there.

Senator Cook: The impossibility of paying in the normal course of business.

Senator Flynn: Yes. If the claim is not settled right there and then and you have no money, then you are insolvent.

You mentioned that this legislation does away with the definitions of acts of bankruptcy. It seems to me that the 10 definitions of insolvency could easily be replaced, as this legislation does, with the words "is insolvent" or "is unable to pay his debts". That has always been my interpretation of the 10 definitions of acts of bankruptcy. They are merely repetitious or illustrative of insolvency in itself.

The Chairman: Surely the determination of insolvency is at that moment.

Senator Flynn: Yes. Saying he is insolvent or is unable to pay his debts amounts to the same thing as the 10 acts of bankruptcy which are described in the present legislation.

The Chairman: Even if the claim is valued, there is no assurance that that value will be realized. The individual concerned cannot look at the situation prospectively, but must look at the situation at that moment.

Senator Flynn: Yes. I am wondering if Mr. Baird is in agreement that we do not need to retain the 10 definitions of acts of bankruptcy.

Mr. Baird: Section 24 of the present act is the section that sets out the acts of bankruptcy.

Senator Flynn: All of those definitions, in my view, would be covered by the words "is insolvent" or "is unable to pay his debts".

Mr. Baird: Yes. For the record, I am not quite sure why they make the distinction. Clause 6 of the bill states:

> 6. (1) A person is deemed to have ceased to pay his debts generally as they become due where, within ninety days prior to the filing of a petition or a proposal,
>
> (a) the person fails to satisfy a final judgment for thirty days—

And so forth. Throughout the rest of the bill the draftsmen ceased using the term "generally as they become due." Those words are omitted throughout the bill thereafter. Thereafter the words "ceased to have paid his debts" or "unable to pay his debts" are used. Omitted are the words "generally as they become due." I am concerned as to whether or not this renders ineffective clause 6.

Senator Connolly: Is there any jurisprudence on the interpretation of that phrase?

Mr. Baird: Yes, there is a great deal of jurisprudence in that respect.

Senator Connolly: That, too, will go out the window if the words are not used.

Mr. Baird: If the same language is not used, yes.

Senator Flynn: Of course, there is the jurisprudence under the Bankruptcy Act, but there is also other jurisprudence in respect of the interpretation of the word "insolvency" under the common law or civil law, and other acts. To me, it always means the same thing, that being that the individual is unable to pay his or her debts.

Mr. Zwaig: Yes, generally as they become due.

Senator Flynn: Of course, you do not have to pay a debt that has not become due.

Senator Connolly: The point I want to emphasize here is a small one. If there is jurisprudence under the Bankruptcy Act, or elsewhere, on the interpretation of "the inability to pay debts as they become due," and those words are not included in the new bill, that jurisprudence will no longer be effective, will it?

The Chairman: It may be persuasive, depending on how it goes.

Senator Connolly: That is true, but it is the precise meaning of it which is often a pretty important matter to people concerned with a bankrupt estate.

The Chairman: But what is the difference between saying that he is "unable to pay his debts" and saying he is "unable to pay his debts generally as they become due"? Surely "unable to pay his debts" means that he is unable to pay what he owes at that moment, where he has the obligation to pay at that moment.

Senator Connolly: Would the committee think the fact that there are judicial findings on this point means we have a valuable body of jurisprudence that is useful?

The Chairman: We have had that point with other expressions, and certainly we have made a note that we will look at it.

Senator Flynn: But you would not have jurisprudence on the wording "generally as they become due." There is jurisprudence on what is meant by "insolvent," but I doubt very much you would find any decision that has gone to the useless trouble of defining "generally as they become due." I would doubt that very much. Have you ever seen anything, Mr. Baird?

Mr. Baird: Not in that form. The old Bankruptcy Act, under section 24(1)(*j*), provides for an act of bankruptcy if a debtor "ceases to meet his liabilities generally as they become due." That phrase has become a catchword and has been interpreted in full. I agree that it is not usually limited to the words "generally as they become due." They look at the whole phrase.

Senator Flynn: They just say he does not pay his debts.

Mr. Baird: The definitions are awkward in clauses 6 and 7 of the bill. Clause 6 refers to the case of a person who "is deemed to have ceased to pay his debts generally as they become due".

Clause 7 says:

> For the purposes of this Act, a person is unable to pay his debts if he is unable to pay all his debts that are certain, liquidated and payable.

They use the word "unable" in one case and they talk about "ceased to pay" in another. They are just using different language to say the same thing. It should be consistent.

Senator Cook: You could have a case of a man who is able to pay his debts but has ceased to pay.

Mr. Baird: That is quite possible.

Senator Cook: Somebody who has been a bit fraudulent; he has got enough money to pay but he does not at that point in time. Is this definition a bit better?

Mr. Baird: I think you should be able to cover both situations, where he has ceased to pay his debts and where he is unable to pay his debts. For the purposes of filing a petition they use only one term. Clause 127 says:

> A debtor who is insolvent or unable to pay his debts may file a petition.

Clause 128 says:

> One or more unsecured creditors of a debtor may file a petition . . . where, at the date of the filing, the debtor
>
> (a) is insolvent or unable to pay his debts.

They have not used the word "ceased" there, and maybe they should be using it.

Senator Flynn: The problem as I see it is really in clauses 5 and 6. Clause 5 tends to define "insolvent," but clause 6 should also define "insolvent." Clause 5 says:

> For the purposes of this Act, a person is insolvent where the property of the person, if it were realized at a fair valuation, would be insufficient to pay all the certain and liquidated debts of that person whether or not the debts are due.

That definition does not provide for the case defined in clause 6, where someone ceases to pay his debts, because you can continue to pay your debts and be insolvent under clause 5. It seems to me that these two clauses should be related to define what is meant by "insolvent" under this bill, whether it applies to the filing of a petition by the debtor or by his creditor, or any other circumstances.

Mr. Baird: That is an excellent suggestion, to define "insolvent," including "ceasing to pay liabilities," and including "unable to pay liabilities."

Senator Flynn: Clauses 5 and 6 should be tied together.

Mr. Baird: Then throughout the bill we would only have to use the term "insolvent."

The Chairman: We have noted that.

Senator Laird: Has not Senator Connolly simply emphasized what we have discussed before? This change in nomenclature means building up a whole new body of jurisprudence, with all the uncertainty in the meantime, and therefore we are deprived of the certainty that exists today with the existing jurisprudence. Is that not so?

Mr. Baird: That is certainly a problem, yes.

Senator Flynn: If we were to define "insolvent" in clauses 5 and 6 as suggested, I think we would have approximately the same wording as under the present legislation, and therefore you could use the accumulated jurisprudence if it were applicable.

Senator Cook: Without delaying the committee, I would point out that clauses 5, 6 and 7 seem to replace section 24 in the present act.

Mr. Zwaig: Yes.

Senator Cook: What is wrong with section 24?

Mr. Baird: They have used the term "insolvent or unable to pay his debts" in many other places. They used it for the purpose of determining when a transaction can be attacked; they have used it in many other situations as well as for the purposes of permitting the filing of a petition in bankruptcy. The term "insolvent" is used more frequently than the acts of bankruptcy were used in the old act. In the old act, once there was a petition, you proved the act of bankruptcy, and you got a receiving order, the question of the act of bankruptcy was discarded and no one ever concerned himself with it again. In the new bill they have used the term "insolvent or unable to pay his debts," in many other situations, for example in attacking a gift; you can go back and attack a gift if at the time of making the gift the debtor was insolvent or unable to pay his debts. There is that type of thing. The language has been used in other sections. I think it is improvement in that sense, that they are trying to bring in a definition that is applicable throughout the bill.

The Chairman: What is the next thing?

Mr. Baird: I would like to continue dealing with petitions. I have given you the provisions for who could get notice; certain government officials are entitled to notice of a bankruptcy petition in respect of special types of debtors. A new provision in the bill is one whereby a debtor against whom a petition can be filed can be examined for discovery prior to the hearing of a petition. Under present jurisprudence, not in the act, the courts have decided that you cannot cross-examine, or even examine a debtor for discovery, prior to the hearing of a bankruptcy petition. I think it is an improvement to provide for that examination, although the counterpart should be there as

well; the petitioning creditor should be required to attend for examination for discovery prior to the hearing. Frequently through discovery you can clarify issues and avoid a lenghthy trial.

The Chairman: It is only a matter of timing. I take it that when a secured creditor files his claim and values his security, he can be examined for discovery or cross-examined on his affidavit.

Mr. Baird: Yes.

Senator Flynn: Prior to the hearing?

Mr. Baird: No, not prior to the hearing. After an adjudication has been rendered any person can be examined who has knowledge or has any dealing with the property of the bankrupt.

Senator Macnaughton: That is clause 139, is it not?

Mr. Baird: The right to examine the debtor comes under clause 139, yes. That is new; that provision has never been in before.

Senator Flynn: What you are suggesting is that we should similarly have examination for discovery of the petitioner.

Mr. Baird: Yes. It is a practice that we have at the present time. For some reason they did not mention it in the new bill. I think it is very useful.

Senator Laird: Why could it not be done by a simple amendment of the exsting act?

Mr. Baird: Yes, it could be.

Senator Flynn: If you do that for everything, this is another method.

The Chairman: What is next?

Mr. Baird: The other significant change is the fact that they have deleted a provision in the act at present, which provides that a petition cannot be withdrawn without leave of the court. This provision has been in the present act to prevent a petition being used as a collection weapon against a debtor. The courts have not permitted a petition to be withdrawn unless the debtor could show that he was solvent and able to pay his debts generally as they fell due. This has been omitted in the bill. It is in section 25(14) of the present Bankruptcy Act. It provides that a petition cannot be withdrawn without leave of the court.

This is going to make a significant change in bankruptcy proceedings. You must combine it with the fact that the administrator will now act if no private trustee is willing to act. This means that even if there are not any assets the creditor can file a petition and have a trustee appointed, so there is no penalty for filing a petition any more. At the present time there is the deterrent, that the petitioning creditor is required to pay the cost of the bankruptcy proceedings, if there are no assets available to pay the fees of the trustee. I think you will see many more bankruptcy petitions filed under the new bill, because there will be no risk involved to a creditor and he will not be penalized by being required to pay the fees of the trustees.

The Chairman: Who is going to pay?

Mr. Baird: The government, the people of Canada.

Senator Laird: Precisely.

Senator Flynn: And it may be used as a weapon for collection.

Mr. Baird: I think it can be used as a greater weapon for collection than it is at the present time.

The Chairman: It may be we should do something about it.

Senator Laird: We certainly should.

Senator Flynn: The cost should be at the discretion of the court. It seems to me that if the petition is made in good faith and there are no assets, it seems that is not fair that the costs should be due by the petitioner. But if it is done by a person who knows there is nothing to gain and who is just trying to blackmail his debtor, then I think the costs should be given against him. The decision as to costs could be left to the discretion of the court, depending on the circumstances.

Senator Cook: It is a large subject. I cannot help wondering why a creditor should be penalized who acts in good faith and files a petition, merely because there are not any assets.

Senator Flynn: If he knows.

Senator Cook: I mean, if he acts in good faith. If he knows, then he would not be acting in good faith. In the ordinary course of good faith, it seems to me that it might be a good thing that the public should know that the debtor is insolvent. It is a big question.

Senator Flynn: Generally speaking, the costs should not be indicated against the petitioner.

The Chairman: If it does not cost anything to put a debtor in bankruptcy and the thought behind it is simply that the pressure will be such that this debtor will scramble up money somehow to satisfy that claim, he may be creating other debts in order to pay this.

Senator Flynn: Other debts will not be in the picture. If by filing a petition you obtain special treatment, you withdraw the petition, you have received payment, and nobody else files a petition.

Mr. Baird: That is the real problem, that is the question—filing a petition, getting paid off and having a petition withdrawn.

Senator Flynn: Special treatment.

Mr. Baird: The present act tries to avoid that special treatment by saying that a petition may not be withdrawn without the leave of the court. They have abolished that in the bill. So you can file a petition, force the debtor to pay and withdraw it; you can do it without making any disclosure of what has happened.

The Chairman: I think the present act is better.

Mr. Baird: I would recommend that also.

Senator Cook: I was just on the particular point of costs. Where a creditor in good faith happens to file a petition and it then turns out that there are not any assets, I do not think it is a good thing to penalize him in costs.

Senator Flynn: That is what I say, give the court discretion in this respect.

Senator Cook: Give the court the legal opportunity.

Mr. Baird: The basic question is who should pay for the administration of an insolvent debtor's assets? Should it be paid for by the petitioning creditor?

Senator Cook: In broad terms, it is a question as to which is the better general policy. Who should pay the costs—should it be the person who has been so reckless, so improvident, so stupid or so imcompetent and has in fact become insolvent, whether that should become a matter of public record in trading circles and people should know about it? It is there that the question of costs does not become very important. Bear in mind that I am agreeing that the petition should not be withdrawn without the leave of the court. I think that is good. I am just discussing the question of cost.

Mr. Baird: Is it in the interest of the public that an insolvent situation be wound up, become public notice and be put to bed legally, or be allowed to dwindle away, fade away without any public record or public administration or public supervision? That is the question.

Senator Cook: Then the costs become very unimportant.

Senator Connolly: Senator Flynn, could I use your example. Suppose a creditor decides to file a petition in bankruptcy against his debtor, and it turns out that some assets are turned up and the debtor is paid. Now he has got the man in bankruptcy at this time, and the question is who should pay the costs. I think your suggestion, that the courts should decide that, is a good one. On the bare facts as I have stated them, the court would say that the creditor was entitled really to file the petition in bankruptcy, that it looked as if this fellow was not paying his debts as they became due. Certainly he did not pay this creditor's debts. Therefore he should not have the costs settled on that creditor. So they should be another debt for the debtor, because he was the one who created the situation that caused the petition to be filed.

Mr. Zwaig: But by going bankrupt the debtor in fact never pays these costs, assuming the company or the debtor has no assets.

Senator Connolly: You cannot assume that, because the debt has been paid. It may be they just had enough assets to pay that debt—in which case perhaps they are going to be in a bankrupt condition.

Senator Flynn: I file a petition and before the order is made my debtor pays me, so I withdraw the petition and so there is no bankruptcy.

Senator Connolly: I see.

Senator Flynn: If the order is made then there would be bankruptcy, then there would be a trustee, then all the creditors would be called in.

Senator Connolly: Between the filing of the petition and the order?

Senator Flynn: Yes.

Senator Connolly: Then I think your further suggestion, that the courts have the discretion, is a good one.

Senator Cook: If not *ipso facto* upon the creditor. I have seen, over and over again, the expression that Mr. Jones was reputed to be very well off, the banks would give credit and people were asked and said he was almost on the brink of insolvency. I have also seen, over and over again, reports of Mr. Jones being reputed to be very well off and he kept on his credit. But the creditor who files the petition was taken in by that and acted in good faith. Why he should be penalized is beyond me. If there were any evidence of collusion in the petition, or blackmail or force, then I would agree.

Senator Connolly: The courts in their discretion could handle that question of cost.

Mr. Baird: The suggestion you have made is that the costs of administration be paid. We must make a distinction between the legal costs of a petitioning creditor in filing a petition, and the costs of the administration—that the court should have the right to require the petitioning creditor to pay the costs of the administration, or that the cost should be borne by the administrator.

Senator Flynn: When there are no assets.

Mr. Baird: We are looking at a situation where there are no assets.

Senator Connolly: Then again if we are looking at that, we could take the question of discretion, as Senator Flynn suggests.

The Chairman: Very well.

Honourable senators, Mr. Baird has finished with his portion of the presentation. Mr. Zwaig is going to deal with the position of appointment of an interim receiver. You could skip over the next insert dealing with banks and we will come to that later. You will see a schedule of submissions by Mr. Zwaig. The first one is the administration of bankrupt estates. It is your turn now, Mr. Zwaig.

Mr. Zwaig: Thank you, Mr. Chairman. Regardless of whether a bankruptcy is voluntary or involuntary, the assets will vest with the trustee, again regardless of whether he is the administrator or the trustee in private practice.

I have noted one item which Senator Cook raised in our past discussions having to do with the net cash surrender value of the life insurance policy as an asset vesting with the trustee. I think this should be changed in accordance with Senator Cook's recommendation to talk in terms of the loan value, because you may find a middle-aged individual going bankrupt and having to abandon a life insurance policy which he had taken out many years previously at a low premium value. We should look carefully at the value of the life insurance policy that ultimately vests with the trustee.

We must also bear in mind that the "exempt property" vests with the trustee to the extent of the $3,000 limit established under section 150 of the act.

Another area for consideration is the after acquired property" of the bankrupt. Here the court, where it is an individual who has the status of bankruptcy, may make an order vesting in the trustee the whole or any part of income in excess of $500 as well as any property which the court deems is in excess of the amount considered necessary for the bankrupt to maintain a reasonable standard of living.

The court determines this based on the investigation carried out by the administrator under clauses 199 and 200, which we have discussed in our earlier proceedings.

One good clause in this bill is clause 148. As a practising trustee, I find that from time to time the trustee has difficulty obtaining insurance on the assets of the bankrupt. This clause provides that the insurance in force as at

the date of bankruptcy vests with the trustee for 30 days after the date of bankruptcy. I would like to see the insurance remain in force so long as required to administer the bankrupt estate, provided, of course, the trustee continues the payments on the insurance in force.

Senator Flynn: Why would an insurer cancel a policy simply because the insured has become bankrupt, if he has paid the premiums?

Mr. Zwaig: The insurance companies do not like the idea of having a trustee in bankruptcy or someone other than the original insured in the premises. Some of the private trustees have an insurance coverage on a reporting basis for these situations, where we are automatically insured up to a ceiling amount on each location in any estate. However, many of the smaller trustees have found great difficulty in getting the necessary insurance coverage.

Senator Flynn: Continued? Normally an insurance company would cancel a risk only for valid reasons other than the fact that the insured has become bankrupt.

Mr. Zwaig: They feel that the risk is changed once the company has become bankrupt.

Senator Flynn: Do you not think we might go too far in some cases?

Senator Connolly: What is your proposal now, Mr. Zwaig?

Mr. Zwaig: The proposal in the bill is that the insurance coverage, as at the date of bankruptcy, vest with the trustee for a period of 30 days. Usually the administration of the estate in liquidating assets is a little longer. It is something like 90 days. I propose that the policy continue in force for 90 days as opposed to the 30 days.

The Chairman: This is a compulsory feature. The insurance company, if you enact this clause, must continue the policy in force.

Senator Flynn: Yes. I would agree with the continuation maybe for a period of 90 days in order to enable the trustee to find another insurer, but saying that you have to continue until the end of the administration would be an unfair imposition on the insurance companies, because there may be other reasons for cancellation of policies of insurance.

The Chairman: Well, you are certainly interfering with the right of the insurance company to cancel. Should that be done?

Senator Flynn: Events may occur which bear no relation to the bankruptcy but would justify the cancellation of the insurance policy.

Mr. Zwaig: May we say, then, that, so long as the protection over the assets remains the same while it is under the administration of the trustee, the insurance should continue?

The Chairman: You see, the effect of this is that, regardless of the condition of the assets, if you say the insurance must continue for 30 days or 90 days, then the insurance company has none of its usual rights of saying, "Well, we don't like the condition at this moment and we are going to cancel." You are taking that away from them.

Senator Flynn: I think you should give them the right to cancel for breach of the conditions of the policy anyway.

Senator Connolly: What is the present law?

Mr. Zwaig: The present experience is that as of the date of bankruptcy they cancel and then the trustee may be left without insurance coverage.

Senator Flynn: There is an automatic transfer of the insurance policy to the trustee.

Mr. Zwaig: Yes.

Senator Flynn: But you say in practice very often the insurance companies cancel.

Mr. Zwaig: Yes.

Senator Connolly: Because of the act of bankruptcy alone?

Mr. Zwaig: Because of that act alone, yes.

Senator Cook: When they cancel, must they not give notice to the trustee?

Mr. Zwaig: Yes, they usually give seven days' notice.

Senator Cook: Well, sometimes when a person goes bankrupt the key is turned in the door and the employees are gone and there is an entirely different risk involved. The insurance company may not want to insure a vacant building or a nearly vacant building as compared to a building which is occupied. I think it is unreasonable to take away the right to cancel, so long as they have to give effective notice—seven days. What is wrong with that?

Senator Flynn: The only solution is that you could provide in the conditions of the policy that the bankruptcy becomes a breach of the policy, and that could justify cancellation.

Senator Macnaughton: It would be a change in the conditions of the contract.

Senator Flynn: A vacant building is one condition which provides for the cancellation.

Senator Connolly: Yes. We are not saying anything here, of course, about the increased risk and the possibility of increasing the size of the premiums because of the change in risk. All we are saying here—and I do not know whether we can do it this way—is that the insurance should be continued for 30 or 90 days. But the conditions under which the insurance is carried may have changed. It may be that the insurance company is perfectly prepared to continue the insurance but at a higher cost.

Senator Macnaughton: It is certainly a point to be noted.

Senator Flynn: Perhaps the solution would be the continuation for a while but still reserving the right of the insurer to cancel for breach of the conditions of the policy.

The Chairman: Other than the act of bankruptcy.

Senator Flynn: Yes.

The Chairman: All right. We have made note of that. Mr. Zwaig, let us go on.

Mr. Zwaig: The bill has provided under clause 183 "disclaimers of leases of real property". In terms of this clause, the trustee may enter into possession of real property for a period not exceeding three months from the date of bankruptcy for the purpose of administering the estate of the lessee including the sale of the property of the

estate. Also, during those three months, the trustee may elect by notice in writing to retain the leased property for the balance of the unexpired term, so that he may sell his rights in that leased property to a person who agrees to observe and perform the terms of the lease. The lessor, however, once he has received a notice of intention by the trustee to continue the lease, may, within 15 days, appeal to the courts the decision of the trustee and attempt to set aside this assignment. The lessor, prior to the transfer of the trustee's rights in the lease, must agree to the transfer. If he disagrees, he must show cause to the courts, and then the courts will adjudicate.

The Chairman: Mr. Zwaig, the only point there, is, supposing there is a provision in the lease that an act of bankruptcy will void the lease.

Senator Flynn: That happens all the time.

The Chairman: Yes. Are you suggesting that this clause in the bill would render that provision of no effect, or that it should render it of no effect?

Mr. Zwaig: I think it should render it of no effect.

The Chairman: Why?

Mr. Zwaig: The provisions in some of the common law provinces presently provide that the trustee may assign his rights or sell as an asset, or realize as an asset, of the estate, his rights in a lease. This is not presently an accepted practice in the province of Quebec. I think some of the lease rights of bankrupt estates can provide a substantially large realization to the estate, and I think that as long as the conditions of the lease are continued, both by the trustee and by a proposed sub-tenant, it could provide dollars for the unsecured creditors.

The Chairman: But is the provision in the bill clear enough and specific enough to enable it to override a condition in the lease that an act of bankruptcy voids the lease?

Mr. Baird: I do not think it does. They have tried to incorporate provisions similar to what we have in Ontario under the Landlord and Tenant Act, sections 38 and 39, and those provisions provide that notwithstanding any term or conditions in the lease itself—these words are missing in section 183—

Senator Flynn: No. I think, if you read paragraph 1(b) of clause 183, you will find that it says:

> (b) during the three months from the date of bankruptcy and before a notice of intention to disclaim is given, elect, by notice in writing, to retain the leased property for the balance of the unexpired term of the lease and any renewal thereof in accordance with the terms and conditions of the lease except as those terms and conditions may be modified by this Act;—

If this act modifies any of these terms and conditions it may be exactly the point of bankruptcy, since it would give the lessor the right to force the lessee to vacate the premises.

Mr. Baird: I think it is quite clear that it is the intention of the draftsman to modify the terms and conditions of the lease by this act, but I do not think he says so specifically.

Senator Flynn: He may not have, but if there is any meaning in these words, it would seem to me that is the case.

Senator Cook: Look at (c). He has a right to assign under (c).

Senator Flynn: If he acts under (b) he can assign.

Senator Laird: Will any constitutional problem arise out of a provision of this kind in the Bankruptcy Act?

Senator Flynn: I do not think so.

Mr. Baird: Well, yes, I think there might be a problem. Similar provisions were included in the original Bankruptcy Act of 1919. They were omitted around 1923, when they were held to be *ultra vires* of the federal government. I think that decision was wrong, and I think, because we are dealing with bankruptcy and insolvency and the right of the trustee in bankruptcy to retain the lease, that such provisions would be held to be *intra vires* of the federal government now; but I think there will be a constitutional problem. I agree with Senator Flynn that these clauses will be upheld, but I do not think we should ignore the fact that there is a court decision saying that similar provisions were *ultra vires*.

Senator Laird: I must have picked that up in law school, or some place.

Mr. Baird: Well, you are right on.

Senator Flynn: Fifty years ago, the Supreme Court was more inclined than it is today to judge as invalid any invasion of the provincial field by the federal Parliament. Today it goes in the other direction. I do not wish to pass judgment on the judgment of the Supreme Court, of course.

Mr. Baird: It is very desirable that the trustee be given the right to retain the premises, because without the right to be within the premises for three months he is in real trouble in trying to recover value from the assets. In addition, if you have a manufacturing plant with machinery that is installed, there is usually a tremendous cost involved in wiring and plumbing, and if you have to pull the machines out and sell them piecemeal, the recovery can be much less than if you sell everything in a package.

Senator Cook: When you were being examined some time ago you said that you can have a situation where there are two companies, one being the landlord, and the owner of the buildings, and so on. If the landlord has the right to terminate the lease because of bankruptcy he is in a much preferred position.

Mr. Baird: Yes.

The Chairman: If you start out with the premise that the federal government has exclusive jurisdiction in the field of bankruptcy, is this particular element related to that subject matter of the bankruptcy? If it is, then it is within the authority of the federal government to enact these provisions. Maybe this is not the best kind of constitutional question for us to wrestle with. We have had better ones.

Senator Flynn: Oh, yes. This one is very interesting, but it is very difficult to form a definite opinion.

The Chairman: Well, it is something that we should note for serious discussion when we are further advanced, after we have talked to and examined the departmental officers, and after we have heard all the submissions. Remember that we are on notice that in September, or whenever the summer recess ends, there will be briefs

coming from, for example, the Chartered Accountants Association, the Canadian Bar Association, the Toronto Board of Trade, and a number of other organizations. I think we can pause on this aspect for the moment, maybe explore it with these people—certainly with the departmental officers—and then, in the light of all that, see what our decision should be.

Senator Flynn: Yes. The test of ancillary power is whether it is necessary to achieve the purpose of the act.

The Chairman: That is right.

Mr. Baird: It really enhances the value of the assets from the point of view of the trustee in bankruptcy, and therefore maximizes the recovery for the creditors. That should be one of the main purposes of a Bankruptcy Act. I am arguing the case for *intra vires,* I suppose.

Senator Flynn: Yes. I think so.

Mr. Baird: There is just one point that I have mentioned to Mr. Zwaig, and I think it is going to be a real problem from an administrative point of view. This arises out of sub-paragraph (13) of clause 183. At the present time, under Ontario law—and I believe it is the same in Quebec—a landlord only has a claim for three months' accelerated rent after a bankruptcy occurs, and no further claim. They have changed this in the bill by deleting the right of the landlord to three months' accelerated rent, but giving him a claim as an unsecured creditor for any loss he might suffer as a result of the trustee in bankruptcy disclaiming a lease after deducting any deposit that has been paid, any accelerated rent that has been paid and any rent paid in advance by the lessee. This is going to be an administrative nightmare for the trustee in bankruptcy, because if it is a long-term lease, it is going to be very difficult to determine the exact amount of that claim.

Senator Flynn: There are problems under the present legislation. The three months period under the present legislation is only a matter of jurisprudence, in Quebec at any event, and it has very often been decided that the landlord was not entitled because he could find another lessee, or because the lease would expire only one month later. So there are reasons for disclaiming that three months' rental. The problem that I have always found in the present legislation in Quebec with regard to lessor and lessee is that the lessor has a privilege on the furniture, and under the present legislation the trustee may sell that, and he must use the proceeds to pay the lessor up to the amount of his claim, which may be past rental or the three months' damages or compensation. I do not know what is done in Ontario. Is that three months' rental a technical penalty or liquidated penalty?

Mr. Baird: If you are given the right to accelerated rent in a lease, and here I am speaking of the Ontario common law, then you are entitled to a preferred claim for three months after the date of bankruptcy plus three months in arrears. That has basically been held to be compensation for the fact that your tenant has gone bankrupt. Then under our law there is no further claim by the landlord in the event of a bankruptcy.

Senator Flynn: But in Quebec your arrears of over three months could be guaranteed by the value of the furniture.

Mr. Baird: In Ontario that would not be the case. In Ontario you would be limited to a preferred claim for three months and any claim of over three months would be ranked as an unsecured claim. I think that is also the case in most other common law provinces.

Senator Flynn: The problem under the existing legislation was that secured creditors under provincial legislation could become only preferred creditors under the bankruptcy legislation and we were always wondering whether you should claim your secured position or your preferred position.

Mr. Zwaig: I think that this would not change the right of the lessor in the province of Quebec when in fact he still has his lien on the assets on the premises.

Senator Flynn: But would he be entitled automatically to three months' rental for the cancellation?

Mr. Zwaig: I do not think he would be entitled automatically. I think it would have to be included in the lease and he probably would only be entitled to the arrears.

Senator Flynn: He cannot recover presently more than the proceeds of the sale of the furnishings?

Mr. Zwaig: That would be my understanding.

Senator Cook: Subclause (12) may answer your question particularly where it says:

> . . . subject to subsections (9) and (13), discharges the estate from liability in respect of the lease disclaimed.

Mr. Baird: The problem is that we are trying to reconcile different provincial laws into one federal statute.

Senator Flynn: Although my interpretation of the present law is that one section—and I do not know which one—says, "subject to the right of secured creditors, preferred creditors are paid in the following order . . ." It means that preferred creditors—preferred because of provincial legislation—were coming ahead of the preferred creditors determined by the bankruptcy legislation.

Mr. Baird: I think under section 107 of the present act you are quite right. Now under our interpretation a landlord is not a secured creditor in Ontario, and he is limited to his rights under the Bankruptcy Act. But he is held to be a secured creditor in Quebec. Now the new bill attempts to abolish many types of secured claims. And it might abolish a claim of a landlord.

Mr. Zwaig: I do not think so. But I think this is an area that we should flag for further consideration.

Senator Flynn: I think it would be interesting to find out what the situation is because this has always posed a problem.

The Chairman: Well, we will flag that one and move on.

Mr. Zwaig: One other area in dealing with leases, the trustee under the present Bankruptcy Act had the right to disclaim a lease and it was a unilateral act. In other words, if the trustee said, "I want to disclaim a lease," as at this date, it would be so without any counter measures available to the lessor. He must under the bill give 30 days' notice to the lessor of his intention to disclaim, and if he doesn't the trustee is liable to the lessor for an additional month's rent.

The trustee, once the bankruptcy has been declared and he has been appointed, must take possession of the property and he must prepare necessary notices for a meeting of the creditors. However, before that meeting of creditors

where his appointment is concerned, and where he thinks it is in the best interests of the estate, he must insure the property, take conservatory measures and obtain the legal advice he deems necessary and with the permission of the court he may incur obligations, borrow money or give security on the assets of the bankrupt estate, as authorized by the court. Here the trustee, of course, has an obligation, once he has borrowed the money, to repay it, and the bill under clause 187 states that where an administrator is a trustee, Her Majesty in the right of Canada is not liable for the fulfilment of the obligation or repayment of the moneys borrowed where the administrator is a trustee and incurs obligations or borrows money pursuant to the clause. So in fact it is limiting the activities of the administrator as to borrowing money.

The Chairman: He is not personally liable?

Mr. Zwaig: It does not say that.

Senator Flynn: The trustee is not?

Mr. Zwaig: I think if a private trustee borrowed from a bank and the assets of the estate pledged were insufficient he would feel he had a moral obligation to repay the deficiency.

Senator Flynn: A moral obligation? That is something different.

Senator Cook: That is new law.

Mr. Zwaig: It is not that. I refer to the fact that the trustee when he goes into a financial lending institution puts his name to a document and usually, in addition to the assets he pledges from the bankrupt estate, the bank looks to him as an individual who has come with this proposition. One of the factors which the bank or lending institution will consider is the fact that the Bankruptcy Act provides that if the administrator comes to the bank he has no support from his employer to repay his obligation.

Senator Flynn: Why should he have? There is none to the trustee.

The Chairman: There is none to the trustee, either.

Senator Cook: I suppose if the administrator gave the bank false, reckless, or irresponsible information, they would probably do that. However, as long as the information were honest, I think the bank would take the risk and that is all there would be to it. I would think that would apply in the case of a private trustee who borrows in a representative capacity rather than a personal capacity, and as long as he puts all the cards on the table fairly as he sees them, I do not think the bank would have any recourse against him.

Senator Flynn: No, the bank would loan to a trustee or an administrator only on the basis of the assets of the estate of the bankrupt.

The Chairman: That is right.

Senator Flynn: Not on the personal capacity of the trustee.

The Chairman: It would not be on his good looks, or anything like that.

Senator Cook: It would be the responsibility of the trustee to give all the information in a fair and honest manner.

Senator Flynn: The only problem is that the federal government would say that the administrator was its employee but it would not be held liable for him under such circumstances because he was acting as an ordinary trustee.

The Chairman: Could it possibly be inferred that, since the bill provides that the government is not liable in cases in which the administrator incurs a loan, the trustee or the person who borrows is liable?

Senator Flynn: It may create a problem in that respect.

Mr. Baird: That can be fairly readily overcome by the provisions of clause 192(2), to be found at page 110 in the orange book and page 96 in the bill, reading as follows:

> All debts incurred and credit received in carrying on the business of a bankrupt are, unless the contrary is proved, deemed to be debts incurred and credit received by the estate and not debts incurred and credit received by the trustee.

I think we could carry on and say that all moneys borrowed by the trustee shall be deemed to be debts incurred and credit received by the estate and not debts incurred and credit received by the trustee.

I agree with you, Mr. Chairman, that that inference might be available, that because the government is not liable specifically a trustee might personally be liable. We definitely do not want that.

Senator Flynn: But clause 192(3) would shift the problem to the other foot. It provides:

> For the purpose of giving a security interest under section 88 of the *Bank Act*, the trustee, where he carries on the business of the bankrupt, is deemed to be a person engaged in the class of business previously carried on by the bankrupt.

I understand the reason for this provision, but by saying that he is "a person engaged in the class of business" might suggest that he is personally liable.

The Chairman: We should explore this with the departmental officers, in order to ascertain their ideas.

Senator Flynn: It is a question of understanding the provisions of clause 192(2).

The Chairman: If there is any possibility of doubt, we should clarify it.

Senator Flynn: Yes.

Mr. Zwaig: At the meeting of creditors, if there is no quorum at the time of the calling of the meeting, the trustee is obligated to wait for a half hour. If no quorum appears, the meeting is deemed to have been held.

The Chairman: This is in cases in which the quorum is one, is it not?

Mr. Zwaig: This is where the quorum is one and is to overcome the problem seen presently by the department in individual or personal bankruptcies in which creditors simply abandon interest and no one shows up. In my opinion it is simply to correct something in the administration of the existing act.

Under clause 193 the trustee is not required to make any tax or other return that the bankrupt was required to make in respect of the time prior to the date of the bank-

ruptcy. This is a problem where the trustee is now charged with the responsibility of making a number of tax and government returns, which seems to have been alleviated in an attempt to reduce the cost of the administration.

Senator Flynn: Would you say that the trustee is not required to file an income tax return?

Mr. Zwaig: He is not required to make any return that the bankrupt was required to make prior to the date of the bankruptcy.

Senator Flynn: I know that, but in the case of a corporation which has not filed in due course its income tax return becoming bankrupt, do you suggest that the trustee is not required to do that?

Senator Cook: Are both the corporation and the trustee relieved of the responsibility?

The Chairman: I believe that there is or should be an obligation on the trustee to file any returns that the corporation was obligated to make, whether the date for such filing followed the act of bankruptcy or occurred in the middle of the year.

Senator Flynn: This is the present legislation, in any event. The trustee must file all such returns.

Mr. Zwaig: Yes.

Senator Flynn: I can understand that he could be relieved of the responsibility to file returns which in any event would not be useful, because the corporation would disappear and so on. However, I do not see how the obligation to file tax returns and returns of that nature could be removed from the trustee.

Mr. Zwaig: The taxing authorities, once a company goes bankrupt, carry out an audit of the books and records in the hands of the trustee. As a result of that they prepare an assessment and their proof of claims.

Senator Macnaughton: You are saying, in effect, that the tax officials come in and prepare their own claim and are therefore as up to date as anyone can be.

Mr. Zwaig: That is correct.

Senator Flynn: Would this prevent the trustee from making returns required by provincial legislation?

Mr. Zwaig: That is the way it reads.

Senator Flynn: It says that the trustee is not required to make such returns, but in cases in which he does the bankrupt is required to assist him. It does not sound very convincing.

Mr. Zwaig: I believe clause 193(2) may refer to compulsory returns affecting third parties such as employees' deductions at source.

Senator Flynn: That is not provided for in clause 193(1).

Senator Laird: Those are returns required to be made prior to bankruptcy.

Senator Flynn: Paragraph 1 covers this.

Senator Laird: From a practical standpoint, I was thinking of even though you are relieved of making returns that should have been made prior to bankruptcy. Let us take the corporation tax situation. You almost have to make those returns. Either the trustee would, or you would have to use the facilities of the Department of National Revenue, as you pointed out. So, from a practical standpoint, it may not have all that much value for the trustee.

Mr. Baird: For the corporation tax, yes. The trustee might be claiming a refund and therefore would file the corporation tax return. What about the employee T-4s? Who would prepare those? They have to be done once a year, in February. Who should do that?

Senator Flynn: The trustee is not required to do it, under paragraph 1.

Mr. Zwaig: When you are talking in terms of the employees' T-4s, and the TP-4s in the province of Quebec, someone has to prepare them. This is where (1) and (2) may be in conflict. Any tax return that must be filed—and I think the T4s fall into that category—have to be prepared with the assistance of the bankrupt, should the trustee require his assistance.

Senator Flynn: Paragraph 2 is in the present legislation, but paragraph 1 is contrary to the present legislation.

Mr. Zwaig: Yes.

Senator Cook: There may also be interest paid on bonds and debentures.

Senator Flynn: I would think the principle should be that the trustees could be dispensed from making some returns if they are not useful. But if they have to be made, then they have to be made.

Mr. Baird: There are certain basic returns, such as employees' returns, that must be filed. I think the trustee is the person to do that. But other returns, such as information returns, are meaningless when a bankruptcy has occurred.

Senator Laird: Such as under the Statistics Act.

Mr. Baird: I think the intention is to relieve the trustee of that type of paper work.

Senator Cook: Is it onerous now?

Mr. Zwaig: It is. The other point that I think legislators are trying to get at here is that there is a substantial cost incurred in the preparation of these returns. The returns have to be prepared. Who is to carry the cost? Perhaps it can be flagged to be dealt with further.

Senator Flynn: Could we give the power to any department or level of government to dispense with the trustee? Dispensation is probably the concept we should try to embody.

Mr. Baird: They should not be required to file those returns prescribed by regulation. We should list in the regulations the ones he would not have to file.

Mr. Zwaig: There are not many returns, as at the date of bankruptcy, which are prescribed.

The Chairman: Shall we move on?

Mr. Zwaig: Under the existing act, the trustee, when the property vests with him, obtains a redirection of mail. This redirection is a judgment rendered by the registrar, *ex parte,* and is usually for a period of 90 days.

Here, under clause 197, they are providing that the administrator may render an order redirecting mail for a

period of 30 days. If the trustee wants to have that period extended to 90 days, he must go to the courts and have it extended from the 30- to 90-day period.

I think the present system, where the court renders the judgment for a period of three months, should stay.

Where the administrator—we discussed this in prior proceedings—carries out an examination under clauses 199 and 200, the trustee, where he has information which he feels is necessary for the administration of the estate, must turn that information over to the administrator.

We have already flagged this particular investigative area of the administrator. We think there should be more input by third parties in the preparation of this report.

The debtor, be it an individual or an officer of the bankrupt company, is required to perform certain tasks to assist the trustee in the administration of the file. These are covered in clause 230.

Where the affairs of the bankrupt are so complex that he has difficulty in preparing the necessary information for the trustee, the administrator may, as a cost of the administration, authorize the employment of an individual qualified to assist the debtor in the preparation of his statement of affairs.

Mr. Baird: Excuse me, Mr. Zwaig. Should that power be given to the administrator? Should not the trustee be given that discretion? This is clause 230. If the affairs are complicated, it is a situation where the administrator is given the power to authorize someone else to assist the debtor. Is that a power we should give to the administrator?

Senator Laird: In other words, should the trustee not use his own discretion?

Mr. Baird: Yes.

Senator Laird: Does he not do so under the present act?

Mr. Baird: Yes.

Senator Laird: What is wrong with that?

Mr. Baird: If he makes a mistake, he can be challenged when he comes to pass his accounts.

Senator Laird: Exactly. The intervention of the administrator all the way through this bill is annoying.

The Chairman: If the trustee is administering the estate, the administrator is not as close to the affairs of the estate. Why does the administrator have this authority?

Senator Laird: Exactly. It is nonsense.

The Chairman: It should be the trustee, surely.

Senator Laird: Exactly.

The Chairman: Have you flagged that?

Mr. Zwaig: Yes.

Senator Flynn: The other point is that because it is the duty of the debtor to perform certain things, it would not cost anything to the estate. If you hire someone to help him, you incur some cost. They want the administrator to come in to see whether it is reasonable to charge that cost to the estate. That is why I think they have the administrator in here. I am not saying that it is necessarily a solution. The way I read it, it is because of the cost charged to the estate that they have the administrator come in.

The Chairman: Regarding that issue, as to whether or not the cost is a proper charge to the estate, when the trustee is making up his accounts—and the administrator is the one who, under the bill, taxes those charges—the determination has to be made as to whether or not it was a proper cost.

Senator Flynn: Yes, but the trustee would have incurred the obligation for the estate. I am not saying that this is necessarily good, but I can see the purpose behind it, that being that they want a check on the costs against the estate where it is the debtor who should do it without any fee.

The Chairman: That may be the explanation that will be given when the departmental officers are before the committee. I suppose we can weigh it at that time.

Senator Flynn: That is right.

Senator Laird: We will weigh it and find it wanting.

Mr. Baird: At the present time, it is the trustee who does most of this work. The trustee prepares this schedule and statement. The bankrupt very seldom goes to the trouble of preparing these schedules. That is all in theory. In fact, the trustee does it. He prepares it and the bankrupt looks at it. Sometimes he changes it, and sometimes he does not. A third party never gets involved.

Mr. Zwaig: There are situations where, if the debtor wants to be very difficult and there is a section such as this, he will start harassing the trustee saying that he needs assistance in preparing it. As I read this section, I interpreted it as meaning that the administrator was the stopgap; that the trustee would have to go to the administrator. It may be that he should go to the court as opposed to the administrator.

Senator Laird: That would be far better.

The Chairman: That is where you will get an effective order.

Mr. Zwaig: That is right.

The Chairman: In any event, we will flag that. What is the next item?

Mr. Zwaig: At a meeting of creditors, the administrator, or his nominee, will chair the meeting. I think that is the way it should be. There should be an impartial chairman. A creditor may vote at the meeting of creditors if he has filed a proof of claim at least one clear day before the date fixed for the meeting of creditors.

The present act provides that the filing of a proof of claim be done prior to the time called for the meeting. I think that is the way it should be. A creditor should be able to come to the meeting and file his proof of claim at the time before voting, as opposed to filing it one clear day before the date fixed for the meeting.

Senator Flynn: But the problem, as you know, is that people come into the room where the meeting is being held and just deposit their claims, leaving no time to check those claims as to their validity. I think the reason for this is to give the trustee or the administrator, or other interested persons, an opportunity to verify the authenticity of the claims. Anyone can drop in and say he has a claim. If

you have 10 people coming in at the same time, what control can you have over it?

The Chairman: In the ordinary corporation voting where people are coming in and voting by proxy, there is a committee to check what is stated on the proxy as against the records of the company.

Senator Flynn: Yes, but that committee is only checking one thing, whereas in this case it is far more complicated.

The Chairman: Yes, there are a number of things to check here and yet they are all essential.

Honourable senators, at this point I should like to interrupt our discussion on the subject matter of Bill C-60 so that the committee can deal with Bill C-57, to amend the Federal-Provincial Fiscal Arrangements Act, 1972. If we can complete our consideration of Bill C-57 reasonably quickly, we might finish up what Mr. Zwaig is now developing.

The committee proceeded to other business.

[*Later*]

The Chairman: Now, honourable senators, time has moved along, and I think we will stop at the stage that we have now reached in connection with the bankruptcy legislation. It leaves a number of points, but not too many, on the subject matter that Mr. Zwaig was dealing with, and it leaves two other items, namely the treatment of banks and of insurance companies. You will find articles on those subjects in the booklet that you have, and we can pick these up at a later date. The later date, of course, may be when you come back, very much refreshed, after your summer recess.

I expect that the committee will be sitting tomorrow when we may have the Petro-Canada bill before us, because I anticipate that it is going to be referred to this committee.

Senator Cook: I promised it would be.

The Chairman: Of course, the Senate can always excuse you.

Senator Flynn: What committee would the gold coin bill go to?

The Chairman: It would come here—that is, if it is going to go to committee.

Senator Macnaughton: Mr. Chairman, the Excise Tax Act is off schedule.

The Chairman: And then of course there are several other bills—

Senator Flynn: And possibly Bill C-2.

The Chairman: —which I expect will come to us, and it may be that the amendments to the Unemployment Insurance Act and the annuities may arrive. I know there is a desperate pressure, so my informants tell me, to attempt to clear Bill C-2 out of the House of Commons. My answer was that while it may be cleared out of the House of Commons, we do not intend to clear it out of here before the summer recess.

So now we adjounr.

Senator McIlraith: Mr. Chairman, before we adjourn, I should draw the attention of the committee to two very distinguished visitors present in the committee room this morning.

The Chairman: I can inform you that one is Gordon Baird, the son of David Baird, and the other is Brian Zwaig, the son of Melvin Zwaig.

Senator Macnaughton: There will be no speeches from them, I take it.

The Chairman: No, we will dispense with speeches by them this time, but when they appear again we may wish them to say something.

Senator Macnaughton: May we again thank our two experts for their aid and assistance?

Mr. Baird: Thank you very much, gentlemen; we have really enjoyed it.

Mr. Zwaig: Thank you, gentlemen; it was very stimulating.

The committee adjourned.

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1974-75

THE SENATE OF CANADA

PROCEEDINGS OF THE

STANDING SENATE COMMITTEE ON

BANKING, TRADE AND COMMERCE

The Honourable SALTER A. HAYDEN, *Chairman*

Issue No. 50

WEDNESDAY, JULY 16, 1975

Complete Proceedings on Bill C-57, intituled:

"An Act to amend the Federal-Provincial Fiscal Arrangements Act, 1972"

REPORT OF THE COMMITTEE

(Witnesses: See Minutes of Proceedings)

29515—1

THE STANDING SENATE COMMITTEE ON BANKING, TRADE AND COMMERCE

The Honourable Salter A. Hayden, *Chairman*

The Honourable Senators:

Barrow	Hayden
Beaubien	Hays
Buckwold	Laird
Connolly (*Ottawa West*)	Lang
Cook	Macdonald (*Cape Breton*)
Desruisseaux	Macnaughton
Everett	McIlraith
*Flynn	Molson
Gélinas	*Perrault
Haig	Sullivan
	Walker—(19)

**Ex officio* members

(Quorum 5)

Order of Reference

Extract from the Minutes of the Proceedings of the Senate, July 15, 1975:

"Pursuant to the Order of the Day, the Senate resumed the debate on the motion of the Honourable Senator Lang, seconded by the Honourable Senator Cook, for the second reading of the Bill C-57, intituled: "An Act to amend the Federal-Provincial Fiscal Arrangements Act, 1972".

After debate, and—
The question being put on the motion, it was—
Resolved in the affirmative.

The Bill was then read the second time.

The Honourable Senator Lang moved, seconded by the Honourable Senator Cook, that the Bill be referred to the Standing Senate Committee on Banking, Trade and Commerce.

The question being put on the motion, it was—
Resolved in the affirmative."

Robert Fortier,
Clerk of the Senate.

Minutes of Proceedings

Wednesday, July 16, 1975
(65)

Pursuant to notice the Standing Senate Committee on Banking, Trade and Commerce met this day at 11.20 a.m.

SUBJECT: Bill C-57, "An Act to amend the Federal-Provincial Fiscal Arrangements Act, 1972"

Present: The Honourable Senators Hayden (*Chairman*), Barrow, Buckwold, Connolly (*Ottawa West*), Cook, Flynn, Haig, Laird, Macnaughton and McIlraith. (10)

WITNESSES:

Department of Finance:

Mr. Sidney A. Rubinoff,
General Director,
Tax Policy and Federal-Provincial Relations Branch.

Mr. David Levin, Director,
Federal-Provincial Relations Division; and

Mr. Douglas H. Clark, Assistant Director,
Federal-Provincial Relations Division.

Following discusion, and upon motion of the Honourable Senator Macnaughton, it was *Resolved* to report the said Bill without amendment.

At 12 *noon* the Committee returned to the consideration of the preceding business.

ATTEST:

Frank A. Jackson,
Clerk of the Committee.

Report of the Committee

Wednesday, July 16, 1975

The Standing Senate Committee on Banking, Trade and Commerce to which was referred Bill C-57, intituled: "An Act to amend the Federal-Provincial Fiscal Arrangements Act, 1972", has, in obedience to the order of reference of Tuesday, July 15, 1975, examined the said Bill and now reports the same without amendment.

Respectfully submitted,

Salter A. Hayden,
Chairman.

The Standing Senate Committee on Banking, Trade and Commerce

Evidence

Ottawa, Wednesday, July 16, 1975

The Standing Senate Committee on Banking, Trade and Commerce to which was referred Bill C-57, to amend the Federal-Provincial Fiscal Arrangements Act, 1972, met this day at 11.15 a.m. to give consideration to the bill.

Senator Salter A. Hayden (*Chairman*) in the Chair.

The Chairman: Honourable senators, we have with us this morning Mr. A. Sidney Rubinoff, General Director, Tax Policy and Federal-Provincial Relations Branch, Department of Finance; Mr. David Levin, Director, Federal-Provincial Relations Division, Tax Policy and Federal-Provincial Relations Branch, Department of Finance; and Mr. Douglas H. Clark, Assistant Director, Federal-Provincial Relations Division, Tax Policy and Federal-Provincial Relatins Branch, Department of Finance. Mr. Rubinoff, I understand, will be the spokesman.

Just before you commence with a brief outline of the bill, Mr. Rubinoff, there is one question that I should like to put to you. In the explanation we received on second reading of this bill in the Senate, it was said that the formula was required to be adjustable; otherwise it created larger sums of money that the federal authority felt it could handle at this time. I do not see anything in this bill that tells me what the "formula" is. I suppose if I went back to the 1972 legislation I would find out. Can you tell me in a few words what the formula is?

Mr. A. Sidney Rubinoff, General Director, Tax Policy and Federal-Provincial Relations Branch, Department of Finance: By way of explanation, the formula applies to the way in which equalization payments to the provinces are calculated. This is done by way of a rather complicated, although not difficult, manner of procedure. Basically, what the so-called formula attempts to do is to measure what the fiscal capacity, the ability of an average province to raise revenues would be, if it had an average tax base. To the extent that a province does not have an average tax base—in other words, it has a tax base less than the national average—a payment is made to that province to make up that deficiency in a way that its revenues from its own sources, plus what it gets by way of equalization payments through this so-called formula, brings its revenues up to the national average. That is the basic, broad explanation of the formula.

It applies at present to 20 different identifiable revenue sources, each of which is measured against some national average. Four of those 20 revenue sources—and they include such things as personal income taxes, corporation taxes, sales taxes, and the like—are related to oil and gas production or the sale of bonus bids, lands and the like. It is these four revenue sources that comprise part of the total equalization formula being amended in the bill, for reasons that Senator Lang explained. That basically, in summary form, is what is meant by the formula as such.

Senator Laird: Is provincial retail sales tax taken into account at all?

Mr. Rubinoff: Yes, it is taken into account in a manner that determines the amount of money to be equalized. It is not taken into account in the sense that a province that imposes a smaller or larger than average tax is penalized.

Senator Laird: That is what I was getting at.

Mr. Rubinoff: This is automatically excluded.

The Chairman: When you strike a national average, how do you go about doing it?

Mr. Rubinoff: Basically it is done simply by examining all of the revenues and other statistical information relating to what the provinces themselves tax and averaging them mathematically. Let me again illustrate this. There was reference to retail sales tax. We have information across the country on what retail sales of goods and services are. We have this information by province; we get the information from Statistics Canada. We also know what amount of revenue each province collects by the rate of tax it chooses to levy. We thus have two pieces of information; we have the provincial retail sales revenues and also provincial retail sales. We are then, simply by adding up all the provincial retail sales and dividing that by the number of people in the country, able to get an average of what retail sales would be in each province.

Let me illustrate this briefly with some hypothetical numbers. If by adding up all the retail sales in the country and dividing by the number of people in the country we had a per capita figure of, say, $1,000, which is simply a hypothetical illustrative number, an average province, assuming it was in fact average, which levied a tax of, say, 5 per cent on retail sales would collect 5 per cent of $1,000 on each person in the province through the imposition of this sales tax, and would get, say, $50 per capita from this tax. If, however, a province were poor, in the sense that its incomes were lower and the like, so that the average retail sales in the province were, say, $800, by the formula this province would have a deficiency of $200 per person in the base, with an average of, say, 5 per cent for the rate, which would be $10 per capita, and that amount of money would be paid over with respect to that particular source to this province. We do this for each of the 20 sources.

The Chairman: Where do you take the money from that you use for those equalization payments? Is it what would be called federal revenues, or do the "have" provinces have to contribute some of their excess?

Mr. Rubinoff: The revenues come from the Consolidated Revenue Fund, which means that they are drawn from whatever sources the Government of Canada draws its money from, which means some people in provinces that receive equalization who may be high income taxpayers

would contribute to that fund as well as people in the provinces that do not receive equalization.

The Chairman: What was the reason for the statement that if this bill had not been introduced with the changes in arriving at the various provinces entitled to equalization payments Ontario would have turned out to be a "have-not" province? What do you mean by that?

Mr. Rubinoff: That statement was based on the supposition that two conditions would prevail: first, that world prices of oil and the equivalent in gas would prevail in Canada rather than the present level; secondly, that the provinces that happen to have oil and gas and derived revenues from them would levy the same rates of royalties and taxes that they presently levy. Were that to happen, Ontario, which is not a major producer of oil or gas—in fact, it produces virtually none—becomes, with respect to that revenue source, a very large "have not" province; indeed, so large, that, given the amounts of provincial revenue that would prevail at world prices of oil and gas, the amount of equalization to which Ontario would be entitled with respect to oil and gas would more than offset her excess or "have" capabilities with respect to other revenue sources, such as income tax and the like. On balance, Ontario would have become a "have not" province in the sense that on balance it would have received equalization, which, depending again on the years one makes assumptions about, could be in the neighbourhood of $800 million per annum.

The Chairman: How have you adjusted that here?

Mr. Rubinoff: The purpose of the bill was to equalize, not all of the oil and gas revenues that the provinces raise, but to equalize all of the oil and gas revenues that they raised prior to the world oil crisis beginning towards the end of 1973, plus one-third of the additional revenues that provinces received subsequent to 1973. This has considerably reduced what could have been, or would be, almost an explosion, I suppose, in the cost of the equalization program.

The Chairman: In arriving at national averages you have made adjustments in relation to oil revenues.

Mr. Rubinoff: The same procedures prevail with respect to oil and gas revenues as prevail with respect to all other revenues. The adjustment made is in addition, with respect to those very large increases in revenues that have taken place subsequent to 1973.

Senator Connolly: Those are the things you call windfalls.

Mr. Rubinoff: Some people call them windfalls, that is right.

Senator Connolly: Traditionally in this area they have been talked of as windfalls.

Mr. Rubinoff: Yes.

Senator Flynn: A windfall is something temporary. You may be faced with a permanent situation.

Senator Connolly: That is right. I remember that on the 1967 act, although the wording is not in the legislation, in the course of the debate the question of making provision to try to anticipate windfalls was discussed. It was a matter I remember Senator McCutcheon raised.

The Chairman: Senator Connolly used the word "windfalls". How long can that description maintain itself?

Mr. Rubinoff: Mr. Chairman, that is a very difficult question.

The Chairman: I am afraid that this bill contemplates it containing itself and being a consideration you have to look at right through until the end of 1976.

Mr. Rubinoff: Until March 1977, that is right, but that is only one year and nine months from now and I must point out that the act expires at that point. Then we will look at it again.

The Chairman: In the income tax bill, which is not yet before us, there is a provision for what they call an abatement of 25 per cent, so that oil companies or resource companies would be entitled to deduct 25 per cent from the corporate taxes they would otherwise pay. That would reduce the federal revenue, because there is no information as to how that 25 per cent is to be used; it is simply a deduction. I have my own ideas as to what the real reason was. I think the real reason was that in this committee, when we were studying the income tax bill earlier—that is, the one that encompassed the two budgets in 1974—we said that instead of allowing any provincial royalties as a deduction there should be a calculation as to what the royalties would be before the excesses were added on to them. We had the companies estimate what that might be and their figures came up to be 25 per cent and that if the royalty principle carried on as it was in 1972 and 1973, there was 25 per cent that might be said to be a real, identifiable, royalty payment.

Mr. Rubinoff: I might add, Mr. Chairman, that the 25 per cent you referred to, is deducted well before many of the expenses are calculated for technical reasons. The result of this procedure is such that, combined with what is now a higher federal rate, now 36 per cent rather than 25 per cent, that the federal revenue is about the same, perhaps it is slightly less than it would otherwise have been under the arrangements prior to the June budget.

One consequence of that is that companies who are investing more in exploration and development would have a larger deduction, and it is one of the reasons why this particular change is made. It is also the case that the effect of having a 25 per cent deduction made at that point in the calculation would be very similar to having made a royalty deduction.

The Chairman: But that royalty on development is the 25 per cent abatement and leaves more revenue income in the hands of these resource companies, and that may very well produce more revenue in the provinces. Has that been corrected in any way in the adjustments made in this bill?

Mr. Rubinoff: In a number of ways. As I mentioned, first of all, the fact of having a deduction of 25 per cent after certain expenses are made, before others are deducted, is to reduce the taxable base somewhat. For the federal government, the increase of 25 to 36 per cent more or less offsets it. The provincial rate of 10 per cent or so is one that, if nothing else were to have taken place, revenues would be very slightly reduced. However, it has been the case that the major provinces who produce oil and gas have in fact been rebating in one form or another to the companies who produce oil and gas those extra revenues that came to the provinces as a result of the non-deductibility. So in a sense it is washed out.

The Chairman: I see,

Senator Connolly: Mr. Chairman, if you have finished with that point, I want to ask a question, but I do not wish to do it until you have finished.

The Chairman: I was trying to see how the different factors were reflected, if they were reflected.

Senator Connolly: I wonder whether the witness could tell us anything about this. Yesterday we had a debate in the Senate. Perhaps he heard it. I am not too sure whether the last two speeches namely, those of Senator Croll and the Leader were completely in order, because I think they were discussing bills that are yet to come to us.

The Chairman: Senator Connolly, I can tell you that I had concluded, even in the Senate yesterday, that they were entirely irrelevant and out of order and if the issue came up here I was going to rule against any questions relating to that issue.

Senator Connolly: Perhaps this is out of order, and it is only one of two questions that I have. You work in the Federal-Provincial Secretariat or in the Department of Finance?

Mr. Rubinoff: The Department of Finance.

Senator Connolly: Are you in touch with the secretariat; you work with them?

Mr. Rubinoff: Yes.

Senator Connolly: In connection with the business of cutting back, if that is the word, on Medicare, do you know whether they are having problems in that area about control?

Mr. Rubinoff: Well—

The Chairman: Just a minute now.

Senator Connolly: This may be out of order. You do not want this?

The Chairman: In my view, any discussion on Medicare is out of order.

Senator Flynn: You are going much further than Senator Croll and Senator Perrault.

Senator Connolly: It is certainly related to the thing.

Senator Flynn: But their discussion—

Senator Haig: At what point of time are the amounts adjusted each year?

Mr. D. H. Clark (Assistant Director, Federal-Provincial Relations Division, Tax Policy and Federal-Provincial Relations Branch, Department of Finance): Payments are made monthly, based upon successive calculations. The main estimate calculation is made three months before the beginning of the fiscal year and that governs the payments that are made in the first three months of the fiscal year. Then we make an interim calculation in the month of June, which subsumes the old calculation, or replaces it, and that governs the payments for the months of July, August and September. We make a second interim calculation in the month of September, which governs the payments for the balance of the fiscal year and determines the payments that are made in the course of the fiscal year.

Then, after the year ends, there are three adjustments made, as final data for that year comes in. This data relates to the different measures of fiscal capacity and to the revenues that the provinces actually collected in the fiscal year. One of these adjustments is made 12 months after the fiscal year ends, the second one 15 months after the year ends, and the third and final calculation is made 21 months after the fiscal year ends.

Senator Haig: You decide whether the federal owes the province or the province owes the federal, in these calculations?

Mr. Clark: The effects of the calculations that are made during the course of the fiscal year simply result in an alteration in the level of monthly payments that are being made. Once the fiscal year has ended, if you make an adjustment, that adjustment can be either positive or negative. If it is negative, there is then a recovery. If it is positive, there is a further payment.

The Chairman: But you have two series going, then.

Senator Connolly: When you make your calculations, do you process them with the various provincial authorities affected? If you do, do you do so through the federal-provincial secretariat?

Mr. Rubinoff: Mr. Chairman, the Department of Finance does all of the processing, not the Federal-Provincial Relations Office of the Government of Canada. Second, the information which is processed is partly Statistics Canada information which is received by certificate from the Chief Statistician of Canada according to the Act. Other information with respect to provincial revenues is received via the provinces, although I will have to turn to Mr. Clark to get a precise answer. We have to work quite closely with the provincial governments to receive precisely the information called for.

Senator Connolly: You do that directly, not through the secretariat.

Mr. Rubinoff: That is right, sir. Perhaps Mr. Clark could elaborate on the provincial revenues.

Mr. Clark: Mr. Chairman, one might distinguish between the interim calculations of equalization and the final calculation. The final calculation, of course, governs the ultimate payments and it is made 21 months after the end of the fiscal year and virtually all of that data comes from either Statistics Canada of Revenue Canada. It is data that they publish concerning provincial revenues or concerning the various measures of fiscal capacity that are used in calculating equalization, and also population. All these data, of course, must be broken down by province.

However, for the interim calculations made during the course of a year, the statistics have not yet been published so we get a great deal of that information directly from the provinces. In addition, there is a small amount even of the final information which does come from the provinces, but it is quite minor.

Senator Connolly: Is the system working well and smoothly?

Mr. Clark: In terms of getting information it works quite well. There is an enormous number of inputs. This is the problem. But, you see, we have until 21 monts after a fiscal year ends in which to make the fisnal calculation. So

if we do not have particular information in one of the earlier calculations—

Senator Connolly: You adjust.

Mr. Clark: —we simply go ahead on the basis of the latest available information and then, when we get the new data, we put it in the next following calculation. The data-collecting system really works very well.

The Chairman: First of all, you have the series of calculations which you make for three-month periods in the year to determine what payments you will make during that period of three months. That happens perhaps three or four times a year. Is that right?

Mr. Clark: Yes.

The Chairman: But then at the same time as you are doing that you are catching up on adjustments in relation to the previous year.

Mr. Clark: Yes.

The Chairman: Is it the same information that you use in both processes?

Mr. Clark: Yes, it is exactly the same information; but what happens is that the first data used will be simply estimates. For example, on revenues we will estimate at the beginning of the year how much revenues the provinces will get from personal income tax in that year. Later on we get the provincial budget figures, which we put in. Then, still later on, we will get revised estimates, preliminary figures, and then, finally, we get the final figures that go into the provincial public accounts and which are then picked up by Statistics Canada and published by them.

The Chairman: The real answer, then, is that you operate from different kinds of information. When you are adjusting for the current year or making your calculations, that is done from estimates in relation to the current year's operations. When you are adjusting, it is in relation to the actual information coming forward in relation to the past year.

Mr. Clark: That is right.

Senator Connolly: Collections are the final determining factor. With respect to the authority for all of this, is it a fair statement to say that the policy for doing all of this was settled at one or more meetings of the federal-provincial body, presumably the first ministers, and later embodied in legislation which authorized the making of regulations to govern your actual activities? Is that a fair statement of what goes on?

Mr. Rubinoff: Yes, sir. Perhaps I could elaborate slightly on that. The broad equalization system as such, which has undergone a couple of major changes, was generally agreed to by ministers following rather lengthy discussions by the ministers of finance, in turn supported by a continuous and rather lengthy series of discussions as between provincial and federal officials. Much of what is in the Federal-Provincial Financial Arrangements Act as such is in the act, and the regulations, while they do spell out a good deal of the detail, do not, in fact, spell out as much as many other acts I am familiar with. A great deal of the equalization formula as such is right in the act, with no discretion as such given in the regulations.

The Chairman: You mean in the 1972 act?

Mr. Rubinoff: That is right, sir, yes.

Senator Connolly: Would it not be right to say, then, that the policy was set perhaps by the first ministers, perhaps by conferences of the finance ministers, and then worked out in detail by the officials? Once it is set, presumably the process of consultation between governments—whether at the ministerial or at the official level—is pretty well finished. Is that right, or do you have continuing discussions at either the ministerial or the official level?

Mr. Rubinoff: Senator, we have continual discussions at both the official and the ministerial levels with respect to the fiscal arrangements. The ministers of finance meet at least once a year. The present Minister of Finance meets at least once a year in plenary session with his provincial colleagues and meets bilaterally perhaps several times a year with them. The officials at the very senior level, the deputy minister level, meet at least several times a year, and officials at a lower technical level meet quite frequently, and they will do so particularly as we go into a revision of the act before the present act terminates. Over the next year and a half we anticipate a series of meetings which might take place perhaps once a month in addition to which there are almost daily conversations by phone as between our own officials and those in the provinces.

Senator Connolly: Mr. Chairman, at the risk of perhaps getting back to the other thing—I just want to do this quickly—I would like to use the example of the matter that we considered to be out of order. In the event that there were difficulties arising in connection with the administration, say, of the Medicare program, would those difficulties be flagged? Are they the signal for discussions with reference to the setting of policy concerning what should be done in the future?

The Chairman: Do you mean as a basis for the purpose of—

Senator Connolly: Of legislation, of action.

The Chairman: —Of equalization payments, the national average, and such things as that?

Senator Connolly: Well, even as the basis of action for changes in the legislation such as apparently are going to arise in the current session.

The Chairman: You mean changes in the legislation on fiscal arrangements?

Senator Connolly: Changes in the legislation on fiscal arrangments, and, to be specific in this case, because this was the thing that was discussed yesterday, even though it might have been out of order—

The Chairman: Well, the only way in which that question could be relevant, it seems to me, would be if the Medicare payments, and all of that field of operations, entered into a determination of all these calculations that are made for the purposes of determining equalization payments, and I was certain they did not.

Mr. Rubinoff: No, sir, they do not.

The Chairman: That is why I said originally they did not enter into any consideration of this bill.

Senator Connolly: In the case of a program getting out of hand, where a change of policy is involved in the federal-provincial fiscal arrangements, are there discus-

sions at the ministerial level, or the official level, with reference to these problem areas?

The Chairman: Well, senator, you have had the answer, that the Medicare payments do not enter into calculations and determinations of amounts.

Senator Flynn: They are not concerned with it.

Senator Connolly: But I think this is relevant to the operation of this act.

The Chairman: Well, I have ruled that it is not.

Senator Connolly: Surely, Mr. Chairman, we are entitled to ask, on a change of policy, or where one is comtemplated, and problems arise, what in fact these officials might know about the way in which that is done. In other words, can the provinces take steps unilaterally? Can the federal government take steps unilaterally?

The Chairman: I think that is an entirely different subject matter.

Senator Connolly: But surely it is relevant.

The Chairman: I do not think so.

Senator Cook: These calculations affect Medicare, but Medicare does not affect these calculations.

Mr. Rubinoff: No, sir, they do not.

The Chairman: With regard to Medicare you are in a different area, a different field.

Senator Connolly: I am not restricting myself to Medicare. I just asked the question in a general way.

The Chairman: Well, the witnesses have told us the areas in which they operate to make these calculations.

Senator Flynn: They cannot give you an answer.

Senator Connolly: That is what Senator McCutcheon said in 1967. This is purely the mechanical field. You have got the mechanics; now suppose these mechanics have to change in some way. How is the policy varied so that the mechanics are changed?

Senator Flynn: The cabinet decides that.

The Chairman: I am sorry, senator, but I do not see the relevance of it.

Senator Connolly: Then I think we will be leaving here with the thing in the air in connection with this very act.

The Chairman: No. This is a separate matter, and it will be before us in due course as a separate matter.

Senator Connolly: Well, as a specific matter, perhaps, but what about the general situation?

The Chairman: Well, the general effect is that it does not enter into these calculations that the witnesses have been talking about.

Senator Connolly: Well, it is not under the existing legislation.

Senator Flynn: Mr. Chairman, I would like to ask the witness what, if this legislation had not been passed, would be the additional amount that the government would have had to pay to "have not" provinces for the year ending, let us say, March 31, 1975, because I see that the act is to be deemed to have come into force on April 1, 1974. I realize, of course, it is an estimate.

Mr. Rubinoff: A rough number, senator, that comes to mind, with respect, I think, to the current year, which would be over and above what is now being paid, would be in the neighbourhood of about $400 million.

Senator Flynn: Did you say for the current year?

Mr. Rubinoff: For the current year.

Senator Flynn: Have you any estimates for last year?

Mr. Rubinoff: About $250 million, approximately.

Senator Flynn: For last year?

Mr. Rubinoff: That is correct.

Senator Flynn: Would Ontario have received part of that?

Mr. Rubinoff: No, sir.

Senator Flynn: Not for last year?

Mr. Rubinoff: Not for last year or this year. The statement I made earlier was with respect to the position of Ontario if world oil prices and equivalent gas prices prevailed in Canada.

Senator Flynn: All of this $250 million for last year, and the $400 million for this year, would have gone to the seven so-called "have-not" provinces.

Mr. Rubinoff: That is right.

Senator Flynn: That excludes Ontario, Alberta and British Columbia.

Mr. Rubinoff: That is right.

Senator Flynn: But you say that Ontario might, under some circumstances, become a "have-not" province.

Mr. Rubinoff: That would be in circumstances in which world oil prices and equivalent natural gas prices prevailed in Canada, and the provinces would have the royalties and taxes on oil and gas, levying them at the same rate as they do now.

Senator Flynn: If this situation, which provoked the government into changing the formula, were to be a permanent one, it seems to me that it would be logical, with the history of the equalization payments, to take into account these added revenues from the increase in the price of oil and gas. I am not asking you for an opinion on policy, of course.

Mr. Rubinoff: I think the observation I might make on that, Senator Flynn, is that the history of the development of the equalization formulas was based on a period when world prices as such were moving in a rather steady fashion.

Senator Flynn: On oil and gas.

Mr. Rubinoff: On oil and gas; but I would suppose, with respect to other matters, that there are very few cases where we have had the kind of situation that has prevailed of late.

Senator Flynn: But there were variations, nevertheless.

Mr. Rubinoff: That is right, sir. I suppose it is a matter of degree. The phenomenon that took place at the end of 1973 virtually shook the world economic system, and had its impact here. It was against that background, of course, that the change was put forward.

Senator Flynn: This change was decided, if I am correct, unilaterally by the federal government; it was not the result of a conference or an agreement with the provinces.

Senator Connolly: This is the question that I wanted to get asked.

Senator Flynn: Then listen to the answer.

Senator Connolly: Well, if it is out of order for me, it is out of order for you.

Senator Flynn: No, no. It is not the same question at all. I am asking about this present bill, not Medicare. Medicare is something else.

Senator Connolly: I withdrew from the Medicare aspect. But I do want an answer. Please go ahead.

The Chairman: Well, let the witness have a chance.

Mr. Rubinoff: Mr. Chairman, the decision, of course, to amend the act lies with the federal government since this is not an agreement as such; it is simply a federal act to make unconditional payments to the provinces. For reasons which the Minister of Finance has explained publicly the decision to make the amendment was taken by the federal government. It is the case, however, that between the time of the quadrupling of world oil prices and the tabling of the legislation, there were numerous discussions with the provinces both at the policy level as between ministers and at the level of officials dealing with technical aspects as to how best to accommodate this amendment to the equalization formula in a way that would be acceptable and sensible within the constraints of the act itself.

Senator Cook: Is anybody satisfied? As a result of all these meetings, is anybody satisfied?

Mr. Rubinoff: Well, senator, satisfaction is a very difficult thing to measure.

Senator Flynn: In fact, the reason for this legislation is that the federal government did not want to pay this additional $250 million for last year and the $400 million for this year.

The Chairman: And they did not want the overall amount to get out of hand; they wanted to keep it in a form they could handle.

Mr. Rubinoff: That is right, sir.

Senator Connolly: All I was looking for, Mr. Chairman, in answer to this question was this: Is there, in a situation like this, machinery available for the solution of these federal-provincial problems? It used to be that at a federal-provincial conference you would have the Prime Minister and the premiers and a great host of federal officials. Have we something better now?

The Chairman: The witness has told us the factors that are taken into consideration in determining the amounts of these equalization payments, and that is it.

Are there any other questions?

Senator Flynn: The problem of Medicare is very difficult.

Senator Connolly: I am not interested in Medicare, as such.

The Chairman: If there are no further questions, is there a motion to report the bill without amendment?

Senator Macnaughton: I so move.

The Chairman: Is it agreed, honourable senators?

Hon. Senators: Agreed.

The Committee reverted to other business.

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FIRST SESSION—THIRTIETH PARLIAMENT
1974-75

THE SENATE OF CANADA

PROCEEDINGS OF THE

STANDING SENATE COMMITTEE ON

BANKING, TRADE AND COMMERCE

The Honourable ALAN A. MACNAUGHTON, P.C., *Acting Chairman*

Issue No. 51

THURSDAY, JULY 17, 1975

Complete Proceedings on Bill C-63, intituled:

"An Act to amend the Olympic (1976) Act"

REPORT OF THE COMMITTEE

(Witnesses: See Minutes of Proceedings)

29517—1

THE STANDING SENATE COMMITTEE ON BANKING, TRADE AND COMMERCE

The Honourable Salter A. Hayden, *Chairman*

The Honourable Senators:

Barrow	Hayden
Beaubien	Hays
Buckwold	Laird
Connolly (*Ottawa West*)	Lang
Cook	Macdonald (*Cape Breton*)
Desruisseaux	Macnaughton
Everett	McIlraith
*Flynn	Molson
Gélinas	*Perrault
Haig	Sullivan
	Walker—(19)

**Ex officio* members

(Quorum 5)

Order of Reference

Extract from the Minutes of the Proceedings of the Senate, July 16, 1975:

> "Pursuant to the Order of the Day, the Senate resumed the debate on the motion of the Honourable Senator Deschatelets, P.C., seconded by the Honourable Senator Norrie, for the second reading of the Bill C-63, intituled: "An Act to amend the Olympic (1976) Act".
>
> After debate, and—
> The question being put on the motion, it was—
> Resolved in the affirmative.
>
> The Bill was then read the second time.
>
> The Honourable Senator Deschatelets, P.C., moved, seconded by the Honourable Senator Asselin, P.C., that the Bill be referred to the Standing Senate Committee on Banking, Trade and Commerce.
>
> The question being put on the motion, it was—
> Resolved in the affirmative."

Robert Fortier,
Clerk of the Senate.

Minutes of Proceedings

Thursday, July 17, 1975

Pursuant to adjournment and notice the Standing Senate Committee on Banking, Trade and Commerce met this day at 9:30 a.m.

SUBJECT: Bill C-63, "An Act to amend the Olympic (1976) Act".

Present: The Honourable Senators Barrow, Buckwold, Flynn, Hays, Laird and Macnaughton. (6)

Present, not of the Committee: The Honourable Senator Deschatelets. (1)

Upon motion of the Honourable Senator Laird the Honourable Senator Macnaughton was elected *Acting Chairman.*

WITNESSES:

Treasury Board Secretariat:
Administrative Policy Branch:

Dr. J. F. Fulton, Director, Planning and Evaluation Division.

Mr. L. Germain, Senior Liaison Officer, Olympic Federal Liaison Unit, Planning and Evaluation Division.

Department of Finance:

Mr. James Hillman, Capital Markets Division, Financial Operations Branch.

Following discussion and motion of the Honourable Senator Flynn it was *Resolved* to report the said Bill without amendment.

At 10:15 a.m. the Committee adjourned to the call of the Chairman.

ATTEST:

Frank A. Jackson,
Clerk of the Committee.

Report of the Committee

Thursday, July 17, 1975

The Standing Senate Committee on Banking, Trade and Commerce to which was referred Bill C-63, intituled: "An Act to amend the Olympic (1976) Act" has, in obedience to the order of reference of Wednesday, July 16, 1975, examined the said Bill and now reports the same without amendment.

Respectfully submitted,

Alan A. Macnaughton,
Acting Chairman.

The Standing Senate Committee on Banking, Trade and Commerce

Evidence

Ottawa, Thursday, July 17, 1975

The Standing Senate Committee on Banking, Trade and Commerce, to which was referred Bill C-63, to amend the Olympic (1976) Act, met this day at 9.30 a.m. to give consideration to the bill.

Senator Alan A. Macnaughton *(Acting Chairman):* in the Chair.

The Acting Chairman: Honourable senators, this morning we have for consideration Bill C-63, an act to amend the Olympic (1976) Act. The sponsor is Senator Deschatelets, and the witnesses are, from the Treasury Board, Dr. J. F. Fulton, Director, Planning and Evaluation Division, Administrative Policy Branch, Treasury Board Secretariat; Mr. L. Germain, Senior Liaison Officer, Olympics; and from the Department of Finance, Mr. J. Hillman, of the Capital Markets Division. It might assist the committee, doctor, if you gave just a short explanation of the bill.

Dr. J. F. Fulton (Director, Planning and Evaluation Division, Administrative Policy Branch, Treasury Board Secretariat): Thank you, Mr. Chairman. This bill responds to a request from COJO to provide additional assistance to their revenue-generating programs. It is meant as an addition to the existing provisions of the Olympic (1976) Act.

Essentially, this bill has two sections. One is to provide for the minting and sale of gold coins to broaden the market base of the existing silver coin program. The reason for two coins being considered necessary is that, on the basis of market studies conducted by the Olympic Coin Program people, they have determined, to the best of their ability, that markets exist in both the numismatic field and in the souvenir field. The numismatists look to their gold coinage to have a high gold content so that it becomes an investment as well as a collector's item. To meet this market, it is planned that the gold content would be in the order of one-half ounce. This coin would be a proof type quality, that is, double struck, and would have a high frosted finish. The other coin, smaller in diameter and lighter in weight, would contain approximately a quarter ounce of gold and is designed for the souvenir market, where purchasers are less concerned about the bullion content, but are protected because both coins would have a face value of $100, and would be Canadian currency, so that the face value provides the protection for souvenir buyers. The bullion content, for the numismatists, allows them some speculative interest.

In both cases, as with the silver coinage, the net revenues, once the total production and marketing expenses have been deducted, would be passed along to COJO for contribution to the Olympic revenues.

The second section of the bill deals with trademarks and copyright. This was found necessary for Expo, because the normal trademark procedures are not really designed to meet the needs of a broad international event such as the Olympics. The bill, as written, would allow rapid response to any cases of infringement. It would simplify the administration so that COJO would not have to try to register as many different signs or logos as the human mind could develop, and it will allow them to give assurance to their licensees of protection from infringement on themselves. It will make a much cleaner program and would, in terms of dollars, reflect several millions in additional revenue to COJO.

This is a fairly clean bill. It goes out of its way to try to protect the prior rights of users. There is nothing being expropriated, other than from the date of introduction of this bill. Those with existing trademarks which are similar to what is now being assigned to COJO will be under no prohibition, except that they will not be allowed to enlarge their market into additional items. If they are now selling running shoes, for example, with a logo on them, they will be prohibited from going into additional wares. This is not unusual. Trademark protection normally limits you to specific wares which you identify when you register your logo. It is therefore not at all a case of unusual treatment. I think that is all, Mr. Chairman, by way of introduction.

The Acting Chairman: As I understand it, in terms of clause 16, subclause (2), those who had prior rights, so to speak, will have those rights returned to them on December 31, 1976.

Dr. Fulton: I think you are referring to copyrights now.

The Acting Chairman: Yes.

Dr. Fulton: The copyright section is slightly different in administration from the one dealing with trademarks. It makes it much simpler if everything is vested in COJO for this period. It allows COJO to represent all of these artists and authors as such, and will allow, as you recognized, their rights to revert to the original owner on December 31, 1976.

The Acting Chairman: Are there any questions?

Senator Deschatelets: Dr. Fulton, strangely enough my question has to do with the silver coin program. This program has not been as successful as we had hoped. I remember that when I purchased the first issue I paid $30 for $30 worth of coins, and these coins were legal tender. That was fine. I think it was a popular issue. For the second or third issue, if I remember rightly, I paid about $40, or $45, for $30 worth of coins at their face value. This, I think, is one of the reasons why this program has not been so successful.

Now, I understand that the main reason for this is the increase in the price of silver. I think it has doubled. It was selling in the first issue at about $2 per ounce, and then it

went to around $4 per ounce. My question is, was there any thought given by those organizing this program to arranging for selling the second and third issue at their face value? When we asked people to pay $30, they would have received at least at their face value $30 worth of silver. That means of course that you would have to reduce the content of silver. Could you comment on this? Was there any thought given to this?

Dr. Fulton: Yes, Senator Deschatelets, there was a great deal of discussion held at the time, to try to maintain the profit margin for the benefit of COJO. There were several alternatives. One could increase the market price or decrease the silver content. It was judged that, to maintain the interest in the marketplace and to maintain the quality of the program which the Mint's reputation was dependent upon, they would prefer to increase the market price and maintain the silver content and the quality of the coinage. It should also be pointed out that in the first issue coins were sold unpackaged at face value. In all subsequent issues they are packaged; in addition to having an increase in the market price you are receiving packaged coins.

Senator Flynn: The witness has mentioned two types of gold coins which it is proposed to mint and distribute. I do not see anything in this bill referring to the two types of coins. I was wondering whether it was simply an administrative decision and if it would not be possible under the authority provided in this legislation to issue three or four or ten types of gold coins.

Senator Deschatelets: Or one.

Senator Flynn: Yes.

Dr. Fulton: Mr. Hillman can respond to that, but generally speaking I can say that all of the details of the final issue are determined by the Governor in Council on the advice of the government.

Senator Flynn: I find in the bill, in clause 1, that the act will be amended as follows:

> (1.1) Notwithstanding sections 4 and 5 of the Currency and Exchange Act, the Governor in Council, on the recommendation of the Minister of Finance, may by proclamation authorize the issue for circulation in Canada of gold coins of the denominations of one hundred dollars commemorating the Olympic and bearing the date 1976.

I suppose it includes the authority to have two types, but it seems to me that it would also permit the issue of ten types.

Mr. James Hillman (Capital Markets Division, Financial Operations Branch, Department of Finance): Mr. Chairman, I do not think there is anything in the legislation that would restrict the number of types of coins to one, two, three or four. The intention is—

Senator Flynn: The intention as announced by the Postmaster General.

Mr. Hillman: —to have two types of coins struck.

Senator Flynn: But the decision is that of the Governor in Council. The Governor in Council is not the minister. It has to be on the recommendation of the Minister of Finance.

Mr. Hillman: This is made by the Minister of Finance, and an order in council is subsequently issued as certified by him.

Senator Flynn: The gold which will be used to mint these coins is gold which belongs to the government, I understand. I think it is mentioned somewhere.

Mr. Hillman: It is in the Exchange Fund.

Senator Flynn: For the purpose of determining the profit which will accrue to COJO, at what price will this gold be valued?

Mr. Hillman: The gold will be valued, sir, at the market price prevailing on the date the gold is taken from the Exchange Fund. The market price will be determined on the basis of the average of the fixing on the London market for five days preceding that date. While the gold is in the Exchange Fund at the official price of $42.20 an ounce, if the market price prevailing on the date of the issue, the day the gold is taken from the Exchange Fund, happens to be $175 per ounce, that will be the price that will be used.

Senator Flynn: I appreciate that, but I am thinking of the value for the government. Let us take half an ounce of gold and say it is worth $165 an ounce, which is the present market price. That means $82.50, plus the cost of minting it, marketing and so on. What is the percentage that will be added to that which will be the share of COJO?

Mr. Hillman: The proof type coin that Dr. Fulton described, containing a half ounce of gold, will be priced in the order of $150 to $175.

Senator Flynn: What would be the share of COJO in that $150?

Mr. Hillman: I am afraid I cannot comment at the moment as to the precise cost.

Senator Flynn: No. I am just trying to get an approximate figure.

Mr. Hillman: $82.50.

Senator Flynn: How do you reach the figure of $150 for the gold coin of the first type?

Mr. Hillman: The selling price would be in the range of $150 to $175.

Senator Flynn: If you had $150, how would you reach that figure?

Mr. Hillman: That is the price determined by the Olympic Coin Program that probably would be charged for the proof type coins.

Senator Flynn: But some estimations have been given that COJO would receive $20 to $25 million over a sale of X coins, so some calculations must have been made of the share of profits which will accrue to COJO.

Mr. Hillman: The $20 million to $40 million range depends on the number of coins that will be sold, of both types, varying between 500,000 and 1,000,000.

Senator Flynn: Can you give me that number?

Senator Hays: What is the profit?

Mr. Hillman: The profit would be between $20 million and $40 million.

Senator Flynn: On how many coins?

Mr. Hillman: The estimate ranges from 500,000 to 1,000,000. Approximately two-sevenths of those coins would be of the proof type and five-sevenths would be of the circulating type.

Senator Flynn: But the profit accruing to COJO, is it based on a sale of 500,000 or 1,000,000?

Dr. Fulton: According to COJO, the profit of $20 million is estimated on total sales of 500,000 coins in a distribution of proof and souvenir qualities. The $40 million is based on a sale of 1,000,000 total coins.

Mr. Hillman: The $20 million to $40 million range depends on the number of coins sold.

Senator Laird: Who projected the mark-up?

Mr. Hillman: The Olympic Coins Program.

Senator Laird: Also it becomes very important in the gross picture to determine what sort of market projection was made. Was it done scientifically or equivocally?

Mr. L. Germain (Senior Liaison Officer, Olympic Federal Liaison Unit, Planning and Evaluation Division, Administrative Policy Branch, Treasury Board Secretariat): Mr. Chairman, we may differ on what a scientific forecast is. I might not call this a scientific forecast, because I received a great deal of scientific training. But I think it was the best that could be done, in terms of the expertise that exists, on the one hand, amongst the dealers worldwide through whom the Olympic coins are distributed, and the expertise that has been accumulated in the last two years in the Olympic Coin Program in the Post Office Department. They commissioned some studies to be done by an independent organization and they also had a large number of interviews with dealers and distributors worldwide, to assess the market for the Canadian gold coins. This is how the market forecast was prepared, and a range was given, to reflect the uncertainty of course, because we have not issued any gold coins here since 1967 and we have to consider what other offerings there are on the market in the way of gold coins. But their reading of it was that the Canadian gold coins would be very much sought after. They felt they could sell half a million coins, and perhaps as many as a million coins.

Senator Laird: What potential sales abroad would there be in this projection?

Mr. Germain: The total projection is 710,000 coins, being split into 210,000 of proof quality coins and 500,000 of the lower quality 14 carat circulating coinage. It is expected that we will sell 43 per cent of the coins in the domestic market and the remainder abroad. It is expected that the United States will take approximately 17 per cent, Germany about 14 per cent and that the remainder will go to various other countries in Asia and Europe.

Senator Laird: With respect to the designs which appear as schedules to the act, Dr. Fulton indicated that the copyright is protected. But what protection is there abroad against production in, for example, Japan of something using exactly this design? Are we in the normal way protected with an ordinary copyright under treaties with various countries?

Mr. Germain: Actually, senator, the designs which are attached to the copy of the act are not related to the coinage. Those are designs on which COJO would hold the trademarks, and they could be applied to all kinds of goods and are really meant to be used in the licensing programs of COJO where it licences manufacturers to apply these trademarks to various goods and wares.

Senator Laird: I see. It has nothing to do with the coins at all.

Mr. Germain: No. The designs of the coins will be commissioned by the Royal Canadian Mint, presumably as soon as this bill receives royal assent.

Senator Hays: Did you say that the coins would be 14 carat?

Mr. Germain: The coin with the half ounce of gold would be 22 carats, and the coin with approximately a quarter of an ounce of gold would be 14 carats.

Senator Hays: What would the total weight of the coins be? What other substances or metals are used?

Mr. Germain: I am afraid I am not an expert in any of these matters, really, and least of all in the metallurgy of the coins. I cannot answer that.

Senator Hays: Will they be stamped "22 carats" and "14 carats"?

Mr. Germain: No, I do not believe there is a stamp on the coins indicating the gold content. The prospective purchasers will simply be informed in the same manner they have been concerning the silver coins. Advertising and promotional material will be prepared and distributed by the Olympic Coin Program depicting the coins and giving full details on the specifications of the coins. The purchaser will therefore be fully aware that there are two coins and how he can distinguish between them from the way they are finished and the bead work around the rims, the appearance of the coins and so on. All these specifications will be available through advertising.

Senator Deschatelets: Mr. Chairman, during the debate on the Olympic bill with respect to silver coins, I pointed out that for every sale of a $5 silver coin there would be an approximate profit of $2.40 for COJO. Senator Flynn has asked if we could have an approximate amount of the profit to COJO from the sale of the gold coins. Assuming a gold coin sold for $150, what would be the approximate profit?

Dr. Fulton: I do not have those specific figures here, Senator Deschatelets, but taking a mixture of the 210,000 proof quality and 500,000 circulating quality, on the basis of a mix of coinage the percentage profit for the program is estimated at 35 per cent to 36 per cent.

Senator Flynn: It would be more than that according to the figures given, because the estimate, if I remember correctly, was based on 500,000 coins which would bring in $50 million. Well, if you give $25 million to COJO that is obviously closer to 50 per cent.

Senator Deschatelets: The $25 million which I mentioned, Senator Flynn, was only an estimate. I am not trying to be pessimistic on the one hand or over-optimistic on the other, but I merely mentioned that if the program is successful it should bring about $20 million to $25 million. It could bring in more or it could bring in less.

Senator Flynn: I was simply basing my calculation on the answer given before.

Mr. Hillman: Senator, on 500,000 sales the gross sales would be approximately $54 million; on a million, $107 million. On the bottom line the net is 35 per cent in both instances. That is where you get the range of roughly $20 million to $40 million, depending on the volume of sales. Does that answer your question?

Senator Flynn: That is about the same thing as on the silver coins, based on the figures given by Senator Deschatelets: $2 on $5. That is about 40 per cent. You say 35 per cent.

Mr. Hillman: The silver coin is netting about 30 per cent on the basis of gross sales.

Senator Flynn: And you would get 35 per cent here.

Mr. Hillman: That is the estimate, sir. I must qualify that. That is based on an estimate of gold at $175 an ounce. We do not know what the gold price will be precisely at the time we go into production.

Senator Deschatelets: How is the production of these coins to be implemented? Will you produce a certain number of coins and then wait to see if the market responds? How is the program arranged? Surely you do not intend to produce the whole 500,000 coins at once.

Mr. Germain: According to the plan, production can only start in early 1976—perhaps February 1—because of the long delivery lead time for the extra presses that will be required to carry out the program and the installation and testing of those presses. If production starts early in 1976 a certain stock will be produced before actual sales begin—based on the demand determined shortly before that—in order to be able to deliver coins rapidly once the sales period begins. However, production would then be scheduled in accordance with the demand as it materialized.

Senator Deschatelets: Is it your expectation, then, that as soon as this bill is passed you will begin to receive firm orders from abroad for delivery many months after?

Mr. Germain: There may be firm orders, but it is not planned to accept firm orders until the opening of a definite sales period as, for example, March 1, 1976.

Senator Flynn: And the determination of the price.

Mr. Hillman: Yes. I do not think, sir, that the marketing will commence really until next spring. So I do not think you will see any orders until the Olympic Coin Program actually announces the gold coin prices, and so on.

Mr. Germain: I think we should distinguish between sales at the retail level and otherwise, and when you speak of sales of coins to wholesalers and distributors, then, senator, what you say is quite correct. Dealers who are very interested in these coins will try to get themselves an allocation.

Senator Deschatelets: With how many countries do you have contacts already for the sale of these coins, whether silver or gold? Is there a large number of them?

Mr. Hillman: I think I would have to say a large number, sir, because there are marketing officers in Europe and in the United States.

Senator Deschatelets: Would it be a hundred countries?

Mr. Germain: It depends on the volume you are talking about. There are some coins going here and there to even more than a hundred countries, but there are sales of considerable volume to at least 50 countries and so really there is business with between 50 to 100 countries.

The Acting Chairman: Any further questions, Senator Flynn?

Senator Flynn: No.

The Acting Chairman: Are there any further questions?

Shall I report the bill without amendment?

Hon. Senators: Agreed.

The committee adjourned.

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FIRST SESSION—THIRTIETH PARLIAMENT
1974-75

THE SENATE OF CANADA

PROCEEDINGS OF THE

STANDING SENATE COMMITTEE ON

BANKING, TRADE AND COMMERCE

The Honourable SALTER A. HAYDEN, *Chairman*

Issue No. 52

TUESDAY, JULY 22, 1975

Complete Proceedings on Bill C-8, intituled:

"An Act to establish a national petroleum company"

REPORT OF THE COMMITTEE

(Witnesses: See Minutes of Proceedings)

29519—1

THE STANDING SENATE COMMITTEE ON BANKING, TRADE AND COMMERCE

The Honourable Salter A. Hayden, *Chairman*

The Honourable Senators:

Barrow	Hays
Beaubien	Laird
Buckwold	Lang
Connolly (*Ottawa West*)	Macdonald (*Cape Breton*)
Cook	Macnaughton
Desruisseaux	McIlraith
Everett	Molson
*Flynn	*Perrault
Gélinas	Sullivan
Haig	Walker—(19)
Hayden	

**Ex officio* members

(Quorum 5)

Order of Reference

Extract from the Minutes of the Proceedings of the Senate, July 17, 1975:

"Pursuant to the Order of the Day, the Senate resumed the debate on the motion of the Honourable Senator Cook, seconded by the Honourable Senator Paterson, for the second reading of the Bill C-8, intituled: "An Act to establish a national petroleum company".

After debate and—
The question being put on the motion, it was—
Resolved in the affirmative.

The Bill was then read the second time.

The Honourable Senator Cook moved, seconded by the Honourable Senator Inman, that the Bill be referred to the Standing Senate Committee on Banking, Trade and Commerce.

The question being put on the motion, it was—
Resolved in the affirmative."

Robert Fortier,
Clerk of the Senate.

Minutes of Proceedings

Tuesday, July 22, 1975
(68)

Pursuant to adjournment and notice the Standing Senate Committee on Banking, Trade and Commerce met this day at 9:30 a.m.

SUBJECT: Bill C-8, "An Act to establish a national petroleum company".

Present: The Honourable Senators Hayden (*Chairman*), Barrow, Connolly (*Ottawa West*), Cook, Desruisseaux, Haig, Laird, McIlraith and Molson. (9)

WITNESSES:

The Honourable Donald S. Macdonald, Minister of Energy, Mines and Resources.

Department of Energy, Mines and Resources:

Mr. J. T. Lyon, Senior Legal Adviser; and

Mr. Ward Elcock, Legal Adviser.

Following discussion, and examination of the witnesses; upon motion of the Honourable Senator Molson it was *Resolved* to report the said Bill without amendment.

At 11:10 a.m. the Committee adjourned to the call of the Chairman.

ATTEST:

Frank A. Jackson,
Clerk of the Committee

Report of the Committee

Tuesday, July 22, 1975.

The Standing Senate Committee on Banking, Trade and Commerce to which was referred Bill C-8, intituled: "An Act to establish a national petroleum company", has, in obedience to the order of reference of Thursday, July 17, 1975, examined the said Bill and now reports the same without amendment.

Respectfully submitted,

Salter A. Hayden,
Chairman

The Standing Senate Committee on Banking, Trade and Commerce

Evidence

Ottawa, Tuesday, July 22, 1975

The Standing Senate Committee on Banking, Trade and Commerce, to which was referred Bill C-8, to establish a national petroleum company, met this day at 9:30 a.m. to give consideration to the bill.

Senator Salter A. Hayden (*Chairman*) in the Chair.

The Chairman: We have for consideration this morning Bill C-8. The sponsor of the bill is with us, so if we run into any areas in which we need expert advice he should be able to offer it. Present from the Department of Energy, Mines and Resources are Mr. J. T. Lyon, the Senior Legal Adviser, and Mr. Ward Elcock, Legal Adviser.

Mr. Lyon, do you have anything in the way of an opening statement you would like to make?

Mr. J. T. Lyon, Senior Legal Adviser, Department of Energy, Mines and Resources: No, sir. Honourable senators, I would, with your permission, prefer to leave the bill as it stands for questioning, rather than make a statement at this time, if that is acceptable.

The Chairman: Do any senators have questions? If not, I will ask some.

Mr. Lyon, I understand that the bill itself provides for Petro-Canada, as and when formed, to acquire Panarctic Oils Ltd. Is that correct?

Mr. Lyon: Yes, sir. Clause 25 of the bill provides that:

> The Governor in Council may sell or cause to be sold to the Corporation, at such fair and reasonable price as may be agreed upon by the Governor in Council and the Corporation, the whole or any part of the capital stock of Panarctic Oils Ltd. held by the Crown, and the Corporation may, in full or partial payment therefor, issue at par common shares of the par value of five million dollars each to the Crown.

The Chairman: The company, Petro-Canada, will be provided with the necessary cash, or it will have a banker that will be ready to provide it, in the person of the federal government?

Mr. Lyon: The funding for the corporation principally will derive from the federal government, which will be the source of its capital. It will be empowered under the proposed legislation to borrow commercially, with government backing and guarantees.

The Chairman: As far as you know, is there any plan to acquire other properties? The bill provides for the acquisition of Panarctic Oils Ltd., but what other companies of that type are directly owned by the federal government?

Mr. Lyon: I cannot think of another company, as such, which is directly owned. However, at the moment the federal government has a part interest in the Syncrude project.

The Chairman: Yes.

Mr. Lyon: When appearing before a committee of the other place the minister indicated that consideration would be given to the transfer of the Canada interest in Syncrude to this particular company. As to whether that is a definite decision, I cannot answer, but it remains a possibility.

The Chairman: What is the percentage interest of Canada in Syncrude?

Mr. Lyon: Fifteen per cent.

Senator Connolly: That is just a financial interest; it is not an operating interest?

Mr. Lyon: Canada is in the process of negotiations with the continuing participants of the former Syncrude project—the three remaining companies—with a view to becoming full participants in the project. At the moment the authority is vote L12d of Appropriation Act No. 1 of this year for financial participation. At the moment financial contributions are being made in parallel to the contributions of the other participants. Negotiations are continuing on a daily basis, as a matter of fact today, towards a fuller participation. Agreements are being negotiated.

Senator Connolly: On what level—the managerial level or the operating level?

Mr. Lyon: Assuming that these agreements are successfully negotiated, Canada will have shares in Syncrude Canada Limited, which is the operating company. It will be represented on the owners' group. At the moment it is represented on the steering committee, which is the interim owners' group. It will have representation on the board of Syncrude Canada Limited and it may well have individuals seconded to the operations of Syncrude Canada Limited.

Senator Molson: No one is on the board at the moment?

Mr. Lyon: No sir.

The Chairman: When you talk about full participation, what do you mean by that?

Mr. Lyon: I was drawing a distinction between purely financial contributions and, in response to my understanding of the senator's question, participation as an active participant in the company. It is more than simply an investment that one is buying for money. One is going to maintain a close watch on how that investment is used.

The Chairman: Is there a ratio between contributions to date which you might anticipate Canada would make in

relation to what the other participants in the operation would make?

Mr. Lyon: Fifteen per cent.

The Chairman: And that is on the basis that the other members of whatever group make contributions that relate to their percentage of interest?

Mr. Lyon: Yes sir. At the moment, expenses are balanced on a daily basis, and 24 hours later, or as soon as possible thereafter, the contributions are balanced on that 15 per cent basis for Canada.

The Chairman: This is a continuing area for contribution?

Mr. Lyon: Yes sir.

Senator Connolly: I assume that the other partners in Syncrude, who are major oil companies, are contributing out of their pool of personnel, either operating people or management groups, or perhaps by the employment of independent contractors to do certain things—because that is a mining operation, really. That is the best way to describe it. Is there a pool of manpower available in the Public Service for that kind of operation, if the Canadian government is to participate?

Mr. Lyon: Honourable senators, that is a most relevant question. Right now, if I can give you the present sitaution, there is a team representing Canada on the negotiations. The leader of the team is Mr. Nicholas Ediger, who is President of Eldorado Nuclear Limited and has had wide experience in the mining industry. That is, as I understand it, a temporary situation. I am a member of the team representing the Department of Justice and the Department of Energy, Mines and Resources.

Senator Connolly: Are you a lawyer?

Mr. Lyon: Yes, sir. We have retained counsel in Alberta, who are on the spot and attend many of the subordinate meetings leading to the steering committee decisions. We have now retained a firm of financial consultants, whose interim report I received on Friday, to look after the government's financial participation. When I say "look after," I mean keep us informed so that we do not get involved in anything we should not be involved in.

As to the broader picture, as to whether we can provide an expert on any one of the many aspects of the Syncrude project, I think that is verging on policy.

Senator Connolly: If it is, we do not want to ask you that.

Mr. Lyon: Nevertheless, from my involvement with the steering committee, I can say that we are certainly looking at situations and people.

Senator Connolly: I wonder, Mr. Chairman, if I might pursue this further, because I recall in the earlier days of the development of the petroleum industry in Western Canada Canadians available for work in that industry were very few. Many of them came from the United States, the United Kingdom, from wherever it was possible to obtain experienced people for both the top levels and the operating sphere—engineers, and so on. Canadian universities had trouble producing personnel to meet the demand.

I take it that demand has been fairly well met so far—I do not assert that, I assume it—but the pool must be limited. I am wondering whether it is felt—perhaps this is a policy question—that the Canadian government can obtain sufficient personnel in Canada other than by raiding the stock of personnel in the industry, those who are employed by other companies who may even be in Syncrude.

The Chairman: The situation might be that you would be raiding the staff of Syncrude, in which you have an interest.

Senator Connolly: It could be.

The Chairman: Is there a pool available, or that could be made available, if the price is right, that would not involve raiding existing operations where the government has an interest?

Senator Connolly: Mr. Chairman, that is pretty close to the policy problem. It is a devious way of getting a policy answer. I suppose there are always people in larger companies, in an industry like this, who are ready to switch. Mr. Lyon, do you know if there is a good deal of switching back and forth?

Mr. Lyon: Honourable senators, certainly some of the employees of Syncrude Canada Limited, in its present form—which is the continuing form because there is no formal accession of the new participants—have been employees of the major oil companies which began the Syncrude project. I refer to Imperial Oil, Gulf, Canada Cities Service, and Atlantic Richfield. Some of those people are still continuing. For example, the present chairman of the board was an Imperial Oil employee. He was president of Syncrude until quite recently. Some of the senior people are seconded either from government or from oil companies which are interested in the new venture.

Senator Connolly: That is about the only place where you could get them. I have one further question. You have a personnel problem, I suppose, if Canada is to participate fully in Syncrude. The magnitude of that problem you are not able to say, but do you think that the requirement of personnel in Syncrude will be as great as the requirement of personnel in Petro-Canada?

Mr. Lyon: Honourable senators, you are getting into areas in which I am not an expert. I think you pointed out yourself, sir, that the Syncrude project is not strictly an oil project; it is largely a mining project.

Senator Connolly: Yes.

Mr. Lyon: The powers and objects sought in Petro-Canada are wide, in the context of petroleum. That leads to a diverse series of interests. As to exactly who would be competing with whom in this area, I would not be qualified to answer.

Senator Connolly: But there is a personnel problem ahead of both projects.

Mr. Lyon: It is a huge project. In any project of this size you will have difficulty in obtaining people.

The Chairman: Our concern is where the personnel would come from to direct the operations of Petro-Canada.

Mr. Lyon: I do not think I can answer that.

The Chairman: I am assuming that we are not just creating a paper company.

Mr. Lyon: In Petro-Canada? No, sir.

The Chairman: Provision is made for management. I am wondering where the management will come from. Do you know anything about them?

Mr. Lyon: Honourable senators, we are turning now from the Syncrude aspect to the Petro-Canada aspect?

The Chairman: Yes, because Syncrude is not something that is going to meld directly into Petro-Canada at this time. I understand there is no such plan that is crystallized in this bill.

Mr. Lyon: That is correct, Mr. Chairman. In my capacity as senior legal adviser, I do not think I can answer your question. I will try to get the answer for you. As to the detailed personnel, I cannot answer that.

The Chairman: We do not want to create something that is headless as far as concerns its ability to carry out the functions that are described in this bill. It is important that we know what plans are available and what direction is intended to be given, as well as how the staff is to be developed to make Petro-Canada an operation.

Mr. Lyon: I understand your question, Mr. Chairman, but I cannot answer it. It is a matter of policy, in my view.

The Chairman: Well, there are two ways in which we can get the answer, the first of which is to invite the minister and let the bill sit until he arrives and provides us with the answer. The other one is for you to undertake to provide us with the answers before the bill is dealt with later today, if it is dealt with.

Mr. Lyon: That is what is called a strong disjunction, "either or". I will do my best, Mr. Chairman, to get the answer.

The Chairman: Well, it is an "either/or" situation. We are entitled to that information.

Mr. Lyon:Yes.

The Chairman: Looking at the objects clause, the objects seem to be tied into projects relating to fuel and energy resources. It would appear that the direction of this company is in the direction of the search for fuels, which would mean oil and, I suppose, possibly coal.

Mr. Lyon: Conceivably, Mr. Chairman. That might come in as an adjective object. The principal object is petroleum.

The Chairman: But it will not generally go into the mining operation?

Mr. Lyon: No, Mr. Chairman.

Senator Molson: Mr. Chairman, that brings up a question I would like to ask, if I might.

The Chairman: Yes, go ahead.

Senator Molson: The powers of the company seem to be very broad, as is quite normal. There is no indication in the bill itself, however, as to exactly what is proposed in the way of activities in the future. I gather that this company will have all of the powers of any of the major oil companies, including distribution and all the other aspects. In other words, Petro-Canada is being established as a competitor of the major oil companies as we know them today.

Has there been any definition as to how far this company intends to go as a national oil company, as distinct from the private oil companies? Is it going to straight competition? Is it going across the board? Does it intend to attack certain fields first? Has there been any declaration of this aspect of the company's operations?

Senator Cook: Perhaps it might help, Mr. Chairman, if I direct the attention of the committee to clause 7)2), which states:

> (2) In the exercise of its powers, the Corporation shall comply with such policy directions as may from time to time be given to it in writing by the Governor in Council.

That does not answer Senator Molson's question, but it does indicate that the corporation will be subject to the direction given it by the Governor in Council.

Senator Molson: Has there been any statement of policy indicating how far the company intends to take up its powers in the initial stages?

Mr. Lyon: Yes, senator. During the commitee proceedings of the other place the minister was questioned fairly closely on this, and in reply to questioning he gave what I would take to be a general statement of policy. There has not been a statement of policy in terms of this particular clause, of course.

The Chairman: Have you the so-called statement of policy that the minister gave?

Mr. Lyon: It is contained in the form of answers to questions in the minutes of the committee meeting of the other place, Mr. Chairman.

Senator Connolly: How far did he go?

Mr. Lyon: All I can do is paraphrase, as briefly as I can and as well as I can recall, the minister's statements. Briefly, what the minister said was that the reason for setting up this corporation is to make a contribution to assure security of supply of petroleum for Canada. In that, its main role will be to identify and, if thought wise, produce Canadian oil and gas. It may be that in the future it will be involved in wider activities, but those are not at the moment planned. The minister, in replying to questions, could see no time when such other activities would be planned. However, the bill is setting up the corporation, and there may come an occasion when it is necessary to do something, and that is why the powers are broader than are intended to be used at this time.

The intention is to make a contribution to the security of supply of petroleum for Canada, and to do that by exploration and production of oil and gas resources.

Senator Molson: That is very helpful. Might I ask whether there have been any representations to the government suggesting that this was an unwise or an undesirable move?

Mr. Lyon: There certainly have been representations, senator. For example, there was much debate in the committee of the other place as well as during second reading debate in the other place—

Senator Molson: That is debate; I understand that. My question is whether there have been representations from outside sources suggesting that the course that we are embarking on is undesirable or unwise?

Mr. Lyon: I think I am right in saying that the Canadian Petroleum Association at one time did make representations, but those representations were on the basis that this company might be a full competitor with other oil companies. As I recall—and I am open to correction on this—the Canadian Petroleum Association did appear before the committee of the other place, and when it was given to understand that htis was not in fact the prevent intention for the company, it withdrew its objection.

Mr. Ward Elcock, Legal Adviser, Department of Energy, Mines and Resources: Honourable senators, I am not sure whether the association withdrew its objection or not, but it did give the impression that its objection, if it had any objection, was on the basis that the corporation would receive special treatment. I think the minister has made it clear in his speeches in the other place, and also in the committee of the other place, that there is no intention to treat the corporation in a special way or to provide it with special treatment that would differentiate it from the private sector. The minister went on to make it clear that the corporation would compete on an equal basis, or as equal as possible, with private oil companies.

Senator Connolly: Was the minister directing his remarks particularly to the selection of acreage for exploration purposes?

Mr. Lyon: In that context, senator, there was considerable questioning in the committee of the other place, and the minister's answer were to the effect that the whole question of acreage in all its aspects was a question under review to be brought forward in a bill which had not yet been approved by the cabinet, or elsewhere, and that it was premature to make any comments on it.

Senator Connolly: A bill in addition to this one?

Mr. Lyon: Yes, sir.

The Chairman: Senator Connolly, on that point, we talk about a bill that has not yet come forward.

Senator Connolly: We are not talking about this bill, then?

The Chairman: No, no.

Senator Connolly: I see.

The Chairman: The question is, what is its purpose? To define the course of conduct in the distribution of oil and gas that may be discovered? Or is it in acquisition—the policy for acquisition of acreage?

Mr. Lyon: Yes. At the moment and for some time now, the whole question of the award of acreage has been under review. That is not dealt with in this bill. As to how or what will be done on the whole question of acreage, I am not in a position to say, and I think the position the minister took in the committee in the other place was the same.

Senator Connolly: In the same context, perhaps we could say this. It seems to me, from what I have read in the newspapers, that with this vehicle—that is, the vehicle proposed by this bill—the government proposes to do what it can to identify and develop oil and gas resources—principally, as I gather, not in the organized provinces but more especially in the Territories and offshore where the federal government has primary jurisdiction—certainly for the first half. The second half is perhaps like the British Columbia case, up in the air. So what you are telling us now is that perhaps there will be a policy declaration in the form of legislation saying whether there will be any special allocation made for the purposes of Petro-Canada in that field.

Mr. Lyon: No, sir. If I may correct that. What I was saying was that in the committee of the other place there was questioning as to any special privileges to be given to Petro-Canada in the allocation of access to oil reserves in the area mentioned. That was the question basically. The answer basically was that this bill gives nothing in particular to the company.

Senator Connolly: Of course. This just establishes the vehicle.

The Chairman: Exept this, that the acreage would be acreage where the right to grant that acreage to any particular applicant would be in the hands of the federal authority.

Mr. Lyon: That is a fact, yes. It is so.

Senator Connolly: The resource is owned by Canada, not by the provinces.

The Chairman: A general question arises as to whether this company in this search for acreage is going to be favoured to the prejudice of the private sector.

Mr. Lyon: Yes, sir, that is indeed the question. That is the question raised in the committee of the other place. My answer to it, for my part, is that I do not know what is going to be in the policy eventually brought out. I am not concealing anything; I do not know. And I think that also was the position of the minister at this time.

Senator Cook: But if land is granted to this company for research, at that point of time it is only taking money from the right pocket to put it in the left pocket. This company would still be owned by the people of Canada.

The Chairman: That is right.

Senator Cook: I would go back one step further, about the intention. If we are passing legislation, we always say the intention of the minister at the time is not of very great importance. The point is, what is the power granted to the corporation. And I would say that the power granted to this corporation is co-extensive with the powers granted to Imperial Oil or any other company. This company can do almost anything in the oil field. It can become integrated, or it can even sell oil from the gas pump. It can do everything. We are really setting up a company which will be able to compete on exactly equal terms with any private enterprise.

The Chairman: If it can achieve the same economies in operation.

Senator Cook: But its powers are such as for Imperial Oil or Texaco or any other company.

Senator Connolly: Senator Cook's question is even more penetrating than that. At one end of the scale there is the question of efficiency of operation by a publicly owned company as against the efficiency of a privately owned company. That is something we always look at and

wonder about. But Senator Cook's question goes further. At the other end of the scale, he says, is the point that it in fact is almost going to be impossible to put this vehicle on the same footing as a privately organized company, because the resources that are to be exploited are in fact now owned by the federal government and whether or not this company pays for those rights on the same basis as the privately owned companies pay for them—in other words, whether it bids for them or not—the money is going to be in the same pocket. Is that so?

Mr. Lyon: Well, sir, if I can just give an example of something else involved, there is the question of the Syncrude project, in which the resource is not owned by the federal power but by Alberta. If the Syncrude operation is passed to Petro-Canada, there you have an example of a $2 billion project in which Canada has 15 per cent at stake, in which the revenues will not be going to the federal government but, in part, to the Alberta government.

Senator Connolly: The royalties will certainly go there.

Mr. Lyon: And there are subsidiary elements also.

Senator Connolly: That really does not deal with Senator Cook's point, as I see it.

Senator Cook: I really had two points. The minister said that this corporation will proceed under the discipline of the balance sheet. In other words, it will be a fully integrated oil company but everybody will be able to see how it is performing, from its balance sheet, like any other company. Therefore, I assume that if it does not pay for the concessions, that will show up in its balance sheet in the way of extra profit; if it does, the profit will not be as great. All I am trying to say—as I have said before on many other pieces of legislation, income tax and otherwise—is that we are really not interested in what the minister's intentions are. We are passing legislation and have to look at what the legislation says. I am saying that, notwithstanding any current restrictions on the thinking of the government or the minister, this bill gives the corporation all the powers of a private company. Therefore, six months from now the minister, whoever he may be, can change his ideas, and this legislation will give him all those powers.

The Chairman: Subject, of course, to this. The effect of what you say is that this bill establishes the company with all the power to carry on all the operations in relation to the production of oil and gas. It will be owned and operated by the Government of Canada and, therefore, it will be in competition with the private sector.

Senator Cook: The minister did say it would operate under the discipline of the balance sheet. In other words, it is supposed to operate under the same rules and regulations as a private company.

The Chairman: Except for payment. This company, if it is bidding for acreage, will have to pay; but obviously the money will come from the company, and that money comes to the company from the Consolidated Revenue Fund or the borrowing of money. So you are creating a vehicle that is a competitor, and a competitor with potential advantages, as against the private sector.

Senator Molson: As I read it, looking at the powers, Mr. Chairman, they can engage not only in the business of oil and gas but they can go into trucking or any variety of things that can be found beneficial to the operation of its main activity. Therefore the type of competition it can offer is endless. The great distinction, as I understand it now, between it and the so-called private oil companies is simply that this has access to $500 million in capital from the Government of Canada, which other companies do not have, plus the ordinary borrowing powers of those other companies. It has all the ordinary powers that any company gets by incorporation.

The Chairman: It is the intrusion of government into what has been private business.

Senator Molson: Yes.

The Chairman: The point is whether the situation is such at this time, with the paramount consideration being exploration and development with respect to oil and gas, that it is of sufficient importance to justify the intervention of the government in this area. It may well be that the purpose is a good purpose. The more people with means hunt for oil and gas today, the better off we are likely to be. However, as we move along the road, what effect will this have on the private sector and the use of its resources in further exploration and development?

Senator Molson: It might be decided five years from now that the corporation will install chains of gas pumps throughout the country, which would be doing something perfectly normal but which would put a completely different aspect on the marketing of oil products. Such action would place the government very much in the private sector in a completely different way. There is nothing to prevent that, and I do not think it could be prevented. We do not necessarily want to prevent it, but we should understand what we are doing. As Senator Cook expressed so well, the fact that the minister announces that it is the intention today really means nothing, because in two, three five or 50 years' time that can be completely changed.

The Chairman: The question is, what power or authority does this bill provide?

Senator Molson: As I read it, it gives all power and authority.

The Chairman: The corporation can enter any phase of the oil and gas business.

Senator Molson: Yes.

Senator Cook: Clause 7(2) provides as follows:

> In the exercise of its powers, the Corporation shall comply with such policy directions as may from time to time be given to it in writing by the Governor in Council.

Clause 7(3) provides:

> Three months before the commencement of each financial year of the Corporation, the Corporation shall submit to the Minister, in such form as the Minister may prescribe, its capital budget for that financial year . . .

Therefore, when we speak of what the corporation might do, in the final analysis we really mean what the government and cabinet may do, which, of course, is subject in turn to parliament. Clause 7(2) provides that the corporation must carry out the policy of the government and clause 7(3) provides that it must submit capital budget.

Senator Molson: May I suggest that the CNR and CBC also must submit capital budgets?

The Chairman: That is right.

Senator Molson: I am sorry to make a bad joke!

Mr. Lyon: May I make a comment with respect to an earlier remark of Senator Cook? I believe I am correct in saying that in the committee of the other place the minister pointed out that the corporation, Petro-Canada, may well find itself involved in undertakings in which the bottom line of that company would not be the over-riding consideration, although it may be one of many. For example, Syncrude is one in which a great deal of money is invested now to find ways of doing things best. That is not certain at the moment.

Senator Cook: It is expected that when the way of doing things best is found profit will be made from it.

The Chairman: I would hope so.

Mr. Lyon: That is right, but at the moment it is a new technology being developed and a new way of doing things. My point is that the minister expressed this view. Other social responsibilities, such as development of native peoples and their skills being used in the work going on in their area enter into the consideration.

With respect to the capital budgets, the provisions of this legislation differ from those under which the Canadian National Railway operates.

Senator Molson: I am glad to hear that.

The Chairman: I would hope so.

Senator Molson: What is the situation with respect to the CBC?

Mr. Lyon: The situation to Petro-Canada differs from that for all the other crown corporations, sir.

Senator Molson: I hope quite materially.

The Chairman: I am sure that is an equivocal answer, though, Mr. Lyon.

Mr. Lyon: No, it is not meant to be.

The Chairman: When you say "it differs from others"—how?

Senator Cook: And why?

Mr. Lyon: It differs inasmuch as clause 5 provides that the approval of the capital budget or supplementary capital budget will constitute the authority for capital expenditures. In the case of other crown corporations the capital budget must be laid before Parliament, but the approval by the Governor in Council does not in itself constitute approval for expenditures.

Sentor Molson: Yes, I think I see the difference.

The Chairman: What is needed with respect to the other crown corporations to constitute the authority to go ahead and incur capital expenditure?

Mr. Lyon: This is a subject on which there are differing opinions. My opinion is that the authority to do things in the other corporations is contianed in their incorporating statute or letters patent.

The Chairman: Yes. Maybe this particular subclause should be enshrined and retained as a form to be used with respect to other situations.

Senator Molson: In all fairness, though, Mr. Chairman, we must say that this will make it awfully difficult to operate. In my opinion, it is most desirable and I agree with you. However, it will make it much more difficult to operate and the deficits may be slightly reduced as a result.

The Chairman: That might be good in itself.

Senator Cook: Why is it assumed that the cabinet has any more aptitude than the board of directors?

The Chairman: I suppose the reason is that they have more responsibility and more accountability.

Senator Cook: And more advice.

The Chairman: Yes, and they have, I would say, unlimited opportunities to secure the best opinions they possibly can, and I am sure they would.

Senator Cook: And, of course, it is similar to a court of appeal and is a second look.

Senator Molson: They have a bigger credit card, Mr. Chairman.

The Chairman: I was just looking ahead and, I suppose, we can only look a short distance ahead. This legislation, when it becomes law, does not mean that Petro-Canada will instantly move into the frontier areas and discover a great flow of oil and gas, thus being faced within a short period of time with distribution problems. That may be pushing a little too far ahead.

Senator Connolly: In my opinion, it would.

The Chairman: Do you know what the program of planning is as to when the company might be in operation, Mr. Lyon? By "in operation" I mean active in exploration.

Mr. Lyon: I am sorry, sir; I cannot answer that except with respect to the possible involvement in the Syncrude project.

The Chairman: It is to be funded by only $10 million during the first year. Now, you know that $10 million will not buy very much in the way of acquisition of acreage and exploration in addition to the contribution to be made to Syncrude.

Mr. Lyon: The funds for Syncrude, though, are in place right now.

The Chairman: Then let us take the other end of it: Of what use is $10 million beyond organizing and maybe searching for areas that appear to be likely for exploration and development?

Mr. Lyon: I am sorry, sir, but I cannot answer a question as to how much can be done with $10 million.

The Chairman: Of course, it is not really a question of policy.

Mr. Lyon: No, sir; it is a question of fact, with respect to which I personally am not qualified to give an answer.

Senator Connolly: I suppose, Mr. Chairman, to be fair to the witness, we have to visualize the situation that at the

moment there is no one in the shape of a chief executive officer for this company; and whether he is going to have a department, say, for exploration and development, or is going to proceed by way of hiring independent and experienced contractors, geologists and others, to do this kind of work, is up in the air at the moment. We just do not know how this company will operate, and I do not think anyone can tell us untill they get an experienced chief executive officer.

The Chairman: Except that we assume that the department has accumulated a substantial amount of basic information on geology and everything else. Is this company, when it is established, going to attempt to duplicate that type of service, or will it lean on the service and information that is already available in the department?

Senator Connolly: That is a good point. We could certainly ask that question.

Senator Cook: All we know about the chief executive officer is that it will not be Mr. Macdonald. The minister said he was not going to appoint himself. That is all we know about it.

The Chairman: Well, there is a precedent.

Mr. Lyon: In reply to your question, sir, I do not know who will be the chief executive officer.

Senator Connolly: Mr. Chairman, I do not think your question has been discussed that is, whether or not the data available to the department on areas where the acreage will be used for exploration purposes by Petro-Canada will be available to the company. I refer to geological information.

Mr. Lyon: You mean, betwen this company and the department of Energy, Mines and Resources? So far as my understanding goes, sir, the answer is no it will not.

Senator Cook: Is that data, to which Senator Connolly refers, available to everyone?

Mr. Lyon: Some of it is published and some is not. To the extent that it is published, it will be available to this company, as to any other company; but there will be no preference given, as I understand it, to this company.

Senator Cook: Is there any information which the department has which is not made public? It is paid for by public money. Why is it not made public?

Senator Connolly: Perhaps that kind of information is useless to oil companies. How do we know? I would think that if a government company has resources in a government department, it should not go looking for the development of that information on its own when it is already available.

Mr. Lyon: I think that is a question of policy and it is not one that I can answer. To the best of my understanding of the situation, it is not proposed that this company will have private access to information not available to its competitors, to use that expression.

Senator Molson: I must say that in some respects I feel, like Senator Connolly, that it should be published. It may be private information, but it belongs to the public in that sense, and it would seem to me that a company owned by the public should have access to anything that may be useful to that company.

Senator Cook: Otherwise, you would have the company employing a department which had spent millions of dollars on getting information for it.

Senator Molson: And that would not show up on the files. At page 12, clause 14(4) says that in this case action can be taken for or against a company as though the corporation were not an agent of Her Majesty. Is this a normal clause in crown corporations?

The Chairman: We have started to do that for some time now, I think.

Senator Molson: Is that in all of them?

Mr. Lyon: It is not in all of them.

Senator Connolly: Was there not an amendment made to the Federal Court Act that applied this idea across the board?

The Chairman: There is the crown liability provision, enabling a crown company to be sued.

Senator Molson: I was wondering whether it is now standard.

Mr. Lyon: It is taken from the Government Companies Operation Act.

Senator Cook: Along the same lines, concerning clause 28, relating to the winding-up procedure, is that the usual clause with regard to crown corporations?

Mr. Lyon: The intention here is to remove the act from the operation of the Winding-up Act. As to whether it is usual, I cannot answer that question.

Senator Cook: Would it not leave the creditor up in the air? It says that no law shall apply. It is new. I was wondering whether it is necessary.

The Chairman: The question is whether a creditor can take action to enforce security, because this bill contemplates an issue of debentures. Presumably if the debentures are in default, the security holder could take action. But this section appears to say that he certainly could not proceed by way of bankruptcy petition; nor could he succeed by way of bringing proceedings by way of winding-up. The only thing would be to sue the crown company, and there is a right to sue a crown company.

Senator Connolly: Judgment would be executed against the Consolidated Revenue Fund. The bottomless pit is there for the creditor. You do not need bankruptcy. You sue the Crown, you get a judgment, and you can execute it.

Senator Cook: Clause 29 repeals paragraph 39(1)(c) of the Canada Development Corporation Act. Would you please explain that?

Mr. Lyon: That is purely a technical provision, sir. Paragraph 39(1)(c) of the Canada Development Corporation Act provides for the sale of government shares in Panarctic Oils. You will recall that we saw, in clause 25, a specific provision, and this amendment is consequential on clause 25.

The Chairman: I should point out to the committee that the minister is on his way here.

Senator Connolly: Mr. Chairman, we have talked about Syncrude, but we have not talked about Panarctic.

Panarctic Oils is another area of this country where the government has a very substantial interest, is it not?

Mr. Lyon: Yes, sir.

Senator Connolly: Is it an operating interest or is it simply an investment?

Mr. Lyon: I think it is simply an investment, but I am not certain.

Senator Connolly: Perhaps you do not know the answer to this question. Does the Canada Development Corporation own the government's interest in Panarctic?

Mr. Lyon: I think not.

Senator Connolly: That is an independent holding?

Mr. Lyon: Yes.

The Chairman: The minister is now here. Mr. Minister, certain questions have been asked. Mr. Lyon has taken the position that they involve policy matters and therefore he cannot reply to them. We are concerned about the availability to the Petro-Canada Company of information that may be in the department relating to geology, information that might assist in exploration and development. We would like to know the extent to which, if at all, that information will be available to the private sector.

The Honourable Donald Stovel Macdonald, Minister of Energy, Mines and Resources: The position with regard to information—and this arises, primarily, in respect of exploration and development of federal territory, that is to say, north of 60, or offshore—is that Petro-Canada would have no greater right of access to information in the hands of the Department of Indian Affairs and Northern Development than would any commercial corporation.

To cite one example, you may be aware that Shell brought in a well last week in the Delta. I have forgotten the exact timing of it, but Shell has about two years in which that information is held confidential within the department. Thereafter, it is then open to any member of the general public. Petro-Canada would not have access to that information in the first two-year period.

Senator Connolly: That is for the purpose of selecting additional acreage?

Hon. Mr. Macdonald: That is right. The notion is that one of the things that Shell has earned by its drilling program is that it should have a period of two years in which to select its next move.

Senator Connolly: And that is under government regulations?

Hon. Mr. Macdonald: Yes. Petro-Canada would not have a greater right to that information than would Imperial, or Gulf, or any other oil company.

Conversely, with regard to information that Petro-Canada might generate in relation to its properties, the private sector would not have any greater right of access to that information. It would fit into the general framework of the law exactly as though it were a corporation entirely at arm's length from the Government of Canada.

In the provinces, of course, the position would be indentical, except probably reinforced in the sense that the reporting authority to which Petro-Canada would report would be a provincial agency, and it, undoubtedly, would not have any special rights in relation to that provincial agency. Whether the provincial agency chooses to hold the information tight, I take it it would treat Petro-Canada no less favourably than other companies in the private sector.

Senator Connolly: There was another point raised by the committee in this connection, Mr. Chairman, and perhaps I can put it to the minister.

This vehicle is going to be owned by the Government of Canada, and within the Department of Indian Affairs and Northern Development, as well as, perhaps, the Department of Energy, Mines and Resources, there may be geological and other information that would be important for this corporation's purposes. Would that information have to be developed by Petro-Canada, or could it rely on the resources that those departments now have in their files, and has from time to time in their files?

Hon. Mr. Macdonald: The information developed, for example, by the Petroleum and Sedimentary Geology Branch of my department, which is situated in Calgary, is, if you like, of a broader general knowledge in relation to the characteristics of the Mackenzie Valley and the high Arctic, and the ways in which, in general terms, the strata of different geological time zones occur and what some of the characteristics of these are. That information would be available to Petro-Canada and is available to the geological and geophysical community generally.

What I was talking about a moment ago was the rather more detailed geological information—for example, given a certain compass bearing, if you sank a hole, the kind of cores you would get and what kind of geology is actually there. They know in general terms the flow of the strata, but they do not know how high or how low they are with the characteristics.

Petro-Canada, then, is going to have to develop within itself an exploration branch which can accumulate the same kind of detailed, localized data about properties that it may hold, or may have an interest in, as is the case with private companies involved in petroleum development and exploration.

The Chairman: You mean in line with the kind of work that companies in the private sector do?

Hon. Mr. Macdonald: Exactly. Private companies, as proprietors or having joint venture interests or farm-outs in certain properties, will have a great amount of very detailed information about specific localized properties which they will try to hold as tight as they can in their files.

The Chairman: Is there any thought that Petro-Canada might, as it goes forward, enter into joint bentures with companies in the private sector?

Hon. Mr. Macdonald: This would be one of the goals of the corporation. In the early years of the corporation one of the prime *modi operandi* will be to enter into joint ventures in the sense that it will be a corporation which emerges on the scene with a fair amount of financial backing but with no properties and with a newly formed exploration team. On this basis, its early participation in significant plays, I think, are going to have to be on a joint venture basis.

A number of Canadian firms, particularly Canadian independents, have come to see me or officials of my department to discuss the possibility of entering into

arrangements with Petro-Canada with respect to their lands.

Their situation at the moment is that they have been traditionally financed by investment money, primarily from the United States, and, of course, by cash flows. Because of the escalation of costs in operating in the Arctic, individual companies cannot swing these deals alone. For that reason, they have approached my department with respect to entering into farm-out arrangements with Petro-Canada, and that is exactly what we would expect Petro-Canada to do in the early years of its operation; that is, to enter into farm-out arrangements with some of the companies which at the moment are rich in lands but poor in cash.

The Chairman: Is it contemplated that this would be a share interest venture, or the provision of money and the earning of income from the use of that money, plus a share of the profits from the operations?

Hon. Mr. Macdonald: I think the most likely one would be a farm-out arrangement whereby company "X" has a certain amount of acreage which it and Petro-Canada agrees is prospective for a 50 per cent interest in the property once developed. Petro-Canada would thereby undertake to pay all the exploration and development costs.

Senator Connolly: It is a share-the-risk proposition?

Hon. Mr. Macdonald: Yes.

Senator Connolly: And, ultimately, a share-the-benefit proposition, if there are any benefits?

Hon. Mr. Macdonald: Yes.

Senator Connolly: That is a standard kind of practice with the oil companies. Usually, they do not go alone into an area, do they?

Hon. Mr. Macdonald: I think the notion they follow is that they really want to spread their bets as wide as possible. That is why you will see the ownership maps, for example, put out by *Oil Week* from time to time showing these infinitely complex property holdings all across the Arctic. Everybody wants a little piece of a particular holding rather than having the geological distinction of having drilled the deepest hole in the Arctic, but also getting the driest one.

Senator Connolly: That brings us right back to the problem that we discussed earlier, Mr. Chairman, that being of experienced personnel to operate a company that is going to compete with the experienced operators in the private sector.

Hon. Mr. Macdonald: That is not an easy question. People have come forward already and have indicated to me that if I ever got this thing off the ground they would like to be associated with it, and they left me a curriculum vitae. There is a certain interest on the part of qualified Canadians, both at home and abroad, to participate in Petro-Canada. One of the difficulties, of course, is going to be the high class personnel who, very appropriately, are going to be expensive. Petro-Canada is going to have to go out and bring people in, without the ability to give stock options or some of the other corporate incentives which are available to the private sector. I do not think we should be under any illusion that the executive overhead cost is going to be quite substantial. If we want a good team, we will have to pay for it.

The Chairman: Without the ability to give stock options, the costs are going to be very much higher than in the private sector.

Hon. Mr. Macdonald: I cannot think of any particular reason, except pure patriotism, why anybody would come in at 50 per cent of what he could expect to receive in the private sector. There could be some individual situations where individuals could join the Petro-Canada team. I am thinking of one particular example, which is that of an individual who is at present with a multinational firm. He is good in his field and he wants to continue living in Canada. His company has told him that they would like him in New York, or Iran, or some other centre, and because he is raising a family he does not want to leave Calgary.

Senator Connolly: Is there a sufficient number of experienced personnel in Canada? In the early days of the oil industry in Canada, the universities were having a great deal of trouble turning out enough engineers to supply the demand. Is the supply now meeting the demand?

Hon. Mr. Macdonald: Yes, I would say so. We have quite a substantial cadre now of trained people right up to the senior executive level. Certainly in the exploration sector, for a variety of reasons, including the fact that exploration in Canada has not been as high in recent years as it has been in other areas of the world, many people have gone abroad to seek work. Some of them are in different locales around the world, which are probably less attractive to them than being here. So there are qualified people around and there is no shortage of talents. I think that is an interesting thing.

Senator Connolly: Would your policy merely be to get Canadians, or to get the best people?

Hon. Mr. Macdonald: I do not think we have to make the choice, because Canadians are fully qualified. It would be interesting to do a quick sampling of the personnel, for example, operating in the North Sea right down to the roughnecks on the rigs. There is a high proportion of Canadian people involved there.

Senator Connolly: Working in companies other than Canadian companies?

Hon. Mr. Macdonald: Yes, working in companies other than Canadian companies. A number of Canadian companies, like Ranger, for example, are also involved there. But also the Canadian personnel have a reputation for being skilled and, coming from the Canadian environment, even the North Sea is not more harsh than some of the operating conditions here.

The Chairman: Is there a substantial number of Canadians working in the North Sea operation?

Hon. Mr. Macdonald: There is a significant number. I am afraid I could not give you any informed detail on this.

Senator Connolly: I do not want to monopolize the questions, Mr. Chairman. I have one more. Shall I ask it now or wait?

The Chairman: When you have a question, ask it.

Senator Connolly: We were talking, Mr. Macdonald, about the proposal that this company should operate in competition with and without any special advantages over operators in the private sector. It has been pointed out that the company's primary interest in the beginning is going to be in the areas where the federal government controls and owns the resource, as in the Territories of the north, and offshore. We seem to come to the conclusion that inevitably three should be an advantage to this company over competing companies from the private sector, because even if this company is required to bid for acreage in competition with private companies, the payment for the acreage is going to go into the federal treasury and whether it is in one pocket or another really does not matter, so that there is a built in financial advantage, at least at that stage.

Hon. Mr. Macdonald: Well, in certain terms, that is true. I think it is important that the company should be judged in terms of its own accounts. I would hope that management would look at acreage on its own merits and not find that it is bidding—even if for payment out of the federal treasury—more for certain land than others competing with it in that regard. It is true that as far as the taxpayers are concerned it all comes back to Canada, but in another sense management which is continually doing this is not going to show a very good perforance. It would be inaccurate to say that the company will be in exactly the same position as any other company. It certainly will have to pay federal corporate income tax, and the bill provides for the payment of certain provincial and other levies. To the extent that it takes land positions within the provinces, it will have to take them on such terms as the provinces provide. The bill coming before Parliament in the fall—

Senator Connolly: As far as provincial lands are concerned, it will have to be on the same basis.

Hon. Mr. Macdonald: It will have to play by whatever the rules of the ball game are in the province, as we are doing in the case of Syncrude now. With regard to land division in the Arctic, there has been a discussion with the industry in regard to proposed changes in the oil and gas land regulations which will entitle Petro-Canada to some kind of preferential position in bidding for land that reverts back to the Crown under the land selection provisions of the land regulations. We have been talking to the industry about this. What form it will take I really cannot say at this time, because it is a dialogue going back and forth and it will finally come forward with the bill.

Senator Connolly: That is a second advantage.

Hon. Mr. Macdonald: That is a second advantage. The exact nature of it I cannot say because the bill has not been finally formulated, but it will come back to Parliament for consideration during the fall.

Senator Molson: That is only on reversions of land?

Hon. Mr. Macdonald: That will be on reversions, senator. The bill will have some indirect impact on current land positions held in the Arctic. Most of the land is held in the Arctic now. One of the purposes of th change would be to free up some of this land in very large holdings to make it available, not just for Petro-Canada but for other potential operators there. The bill will be coming forward in the fall, to change the system fiscally and in terms of land choice. That could give a preferential advantage to Petro-Canada. Of course, Petro-Canada does have the not inconsiderable advantage of having as its prime taxpayer one of the largest sources of funds in Canada, rather than having to go on the market from time to time to raise money. It has an access to cash which will be very favourable.

Senator Molson: I would suggest it has a larger credit card.

Hon. Mr. Macdonald: A very attractive credit card.

The Chairman: Mr. Minister, talking about money being available, there has been some discussion about the $10 million earmarked for the first year. Any person who has had experience with oil and gas development, or any mining operation, knows that $10 million in areas that we are talking about will not go very far. What is the concept of limiting the expenditures in the first year to $10 million?

Hon. Mr. Macdonald: We are talking about the current fiscal year, which, as you know, comes to an end at the end of March 1976. It is a recognition that in fact the corporation will not be able to be formed in such a way as to be making very substantial investments really before the end of the next six months. The kind of executive talent we are talking about, the kind of exploration talent, is obviously going to take some months to put together with care. Most of the expenses in these next seven or eight months will be those of overheads, to establish a head office, to acquire personnel, and so on. It is unlikely that the corporation will be in a position to make a very large investment in that period.

I have to say, on the other hand, that I will be going back to the Minister of Finance and the President of the Treasury Board for the year commencing in 1976 and going on to 1977 and saying that we are going to have the instrument in place and that we are going to be seeking some substantial amounts of cash. A footnote to all of this is that we are talking about the $10 million that is to be set aside from the obligations that the Government of Canada already has under the Syncrude agreement. I think we are talking about $138 million in the current fiscal year for Syncrude. That is on top of the $10 million. In the balance of this year, most of the activity in Petro-Canada will be administering our responsibilities in oil and gas.

Senator Connolly: In oil and gas, at least in the operation side, with Panarctic, Syncrude and now Petro-Canada.

Hon. Mr. Macdonald: In effect, Panarctic management will remain separate and will be representing public and private shareholders under the aegis of Petro-Canada. The Syncrude operation— I should not be trying to anticipate management—will acquire the oil sands division and then of course there will be exploration and development.

Senator Connolly: You say that Panarctic is going to be under the aegis of Petro-Canada.

Hon. Mr. Macdonald: Yes. There is a provision there that it will be a book entry within the Government of Canada, but the Government of Canada's 45 per cent interest in Panarctic will be transferred as a portfolio investment into Petro-Canada.

The Chairman: Has Canada Development Corporation any interest in Panarctic?

Hon. Mr. Macdonald: They had none. There was a stipulation provided in the CDC bill that with the consent of the

Governor in Council they could acquire the federal government's interest in Panarctic. Through my urging, the Governor in Council decided not to give that to the CDC but instead to transfer it—

Senator Connolly: As a portfolio?

Hon. Mr. Macdonald: Yes, as a portfolio, to Petro-Canada. The notion is that if you have a federal petroleum management you should aggregate the petroleum assets under that management rather than have it continue to be administered by the Department of Indian Affairs and Northern Development.

Senator Connolly: And Syncrude likewise would come under this?

Hon. Mr. Macdonald: Yes, Syncrude will come under this.

Senator Cook: Mr. Minister, I wonder if you could hazard a guess at the present moment. Leaving aside Syncrude and Panarctic, 100 per cent of the exploration and development is in private hands, in the private sector. Looking ahead a few years and assuming that Petro-Canada is going to be a reasonable success, what percentage would be public ownership? Would you hazard a guess? Would it be 10, 15, 25 per cent, or what?

Hon. Mr. Macdonald: I would think, senator, that if in a decade there was 15 per cent in public hands that would be the maximum. The $1,500,000,000 is a lot of money. In terms of the expenditure that will be required in the petroleum sector just to keep us where we are, as I recall, we estimated that on exploration and development alone we would be looking for $28 billion in the next decade. In this sense the Petro-Canada participation will be significant, but it will remain something less than a quarter of the total funds to be employed in this area.

Senator Connolly: Are you saying that ultimately the Government of Canada will own only 15 per cent of Petro-Canada?

Hon. Mr. Macdonald: No, it will own 100 per cent of Petro-Canada, but that 100 per cent of Petro-Canada could at the most only equal 15 per cent of the total investment by all firms in the next ten years.

The Chairman: The only place where the public would come in would be if you made any debentures.

Hon. Mr. Macdonald: Yes. The corporation does have the authority to create subsidiaries, and it is conceivable that, either with Panarctic or on its own, a particular oil-gas leg could be isolated in such a way with a primary distribution or secondary distribution to members of the public who might like to invest in it.

Going to the question as to why there is no provision in the bill for more investments by members of the public to come in, I think Syncrude is the best example of the kind of long-term investments made as much for reasons of public policy as for reasons that would guide an investor. Somebody used the term "patient money," money that would be prepared to sit out much longer than a private investor could, where we think it is important from a national standpoint that we should have the investment made but where it would be unfair to load it on an individual private shareholder. It will be no secret, I think, that some of the partners in Panarctic, from the 55 per cent private side, are becoming a little restive owing to the fact that they are continually having to meet calls for further exploration and development money but that at the moment they cannot see, even over the horizon of ten years, any certainty of cash flow back from that. This is becoming for them a rather onerous investment.

Senator Connolly: The problem is transportation.

Hon. Mr. Macdonald: The problem is, of course, when the Polar Gas Line can be built. The first problem is that of establishing the threshhold of gas, 20 trillion cubic feet. I think there is the feeling in the industry generally that this can be met. The second is, of course, swinging the enormous costs of bringing the line down.

Senator Connolly: What is the present status of the government's investment in Panarctic, if the question is not out of order?

Hon. Mr. Macdonald: The aggregate figure now escapes my mind. I think we were talking about $68 million at one point. I must confess that I would have to dig it out of previous proceedings. It is somewhere in that order though. We have met all the calls, of course, as time has gone on.

Senator Connolly: To the extent of about $68 million.

Hon. Mr. Macdonald: That figure sticks in my mind.

Senator Connolly: What is the value of the proven reserves?

Hon. Mr. Macdonald: They have proven between 13 and 15 trillion cubic feet. It remains speculative at the moment as to what the actual value is. It has to be discounted value because it is between 13 and 15 trillion cubic feet in the ground to be accessible by a pipe line which will only have been constructed ten years from now at the earliest.

Petro-Fina bought in for part of the Sproule estate interest at somewhere around $10 a share. That was just a small portion.

Senator Connolly: When the investment was made I understood from senator Arthur Laing, who was the one who had so much to do with this, that the investment was quite profitable for the government. Is that so?

Hon. Mr. Macdonald: I do not think there is any doubt about that. Indeed, if the government, for any reason, decided that it wanted to put its 45 per cent on the market, which is control, it would achieve a substantial return. The multinationals would be delighted to buy into it.

Senator Connolly: Without a capital gains tax.

Hon. Mr. Macdonald: I think in that case there would be an exemption on that.

Senator Molson: The powers of Petro-Canada would include, I suppose, the ability to go into any ancilliary activity a company of that sort would want. I suppose that would be necessary. In other words, even if they were at the very end of the list of objectives, would it be necessary to have within the powers of the company distribution and retail sales, or would they ever be a factor in the company's activities?

Hon. Mr. Macdonald: Senator, this is a matter which was much debated, we decided to put it in, and the final reason is that it is conceivable that Petro-Canada would, by agreement, acquire positions in some smaller integrated

companies in Canada and, in that sense, would need to have corporate powers to pick up a small integrated firm, primarily because of its production assets. Then, of course, it would want to have the corporate powers to be able to pick up all of its assets, including retail outlets which very likely it might like to dispose of independently. You would be faced continuously with the legal problems of *ultra vires* unless you gave the bigger company some powers.

In terms of the broader sense of moving out of the area of legal powers and in terms of the prime motivations behind Petro-Canada, it does not seem to me that there is any appeal in getting into either the refinery area or the distribution area. Having additional filling stations on the corner will not enhance Canadian security. That is why I have been able to disavow from time to time the NDP's suggestion that they should buy out Imperial or Gulf or Shell. It does not seem to me that there would be any net addition to Canadian security by buying a fully-integrated firm.

What you really want to do is to get the money out into the tough areas of exploration and development and to develop a better technology for the oil sands and, of course, carry ahead with the state of scientific achievement to this date in Syncrude. We also want to be developing a broader expertise in the petroleum sector of Canada. The notion of retail distribution is something that has to be a very low priority.

The Chairman: Within the scope of operation, I suppose you would have to contemplate the pipe line.

Hon. Mr. Macdonald: Very much so, senator. the *Financial Post*, I think it was, raised the question, when I commented at one of the committee hearings under the notion that Petro-Canada might indeed be interested as one of the possible participants in the polar gas study, and said that this appears to be inconsistent with our position. Of course, the Government of Canada is already deeply involved and interested in the polar gas study because it is a 45 per cent holder of Panarctic which would be the beneficiary of this. So, at a very early date I am sure the managers of Petro-Canada are going to receive calls from the polar gas people who are going to come around and say, "Look, we are moving on to the next stage of the polar gas study. We think that you should ante up some funds to pay for this because you have an interest in it."

I have the more specific report on Panarctic here, Senator Connolly. There are $16\frac{1}{2}$ million shares outstanding to the account of the Government of Canada in Panarctic, which represents 45 per cent of the issued shares. All of the federal money has come in in the way of equity. Between 1967 and 1975 an aggregate of $66.75 million has been advanced to Panarctic.

The $66\frac{3}{4}$ million represents approximately 22 per cent of the total expenditures of Panarctic in the Arctic Islands. They have used that as a lever, of course, to get a number of people farmed into the Panarctic property. So they have financed it that way.

Senator Connolly: But there is no idea of the value of the proven reserves.

Hon. Mr. Macdonald: One thing we are going to have to do is to value the government portfolio in Panarctic for the purposes of transferring to Petro-Canada. I think the Minister of Indian Affairs and Northern Development would like to see this transferred on commercial terms, and it looks to me as if we will have to go outside for consultants to put a valuation on this. This, of course, will be a matter of intense interest among the 55 per cent of the shareholders, because we will then be establishing a very formal bench mark as to what their portfolio in Panarctic is worth.

Senator Connolly: You will need more than one opinion of what that is worth.

Hon. Mr. Macdonald: Yes, certainly.

The Chairman: Subject, of course, to capital gains tax.

Hon. Mr. Macdonald: That is right.

Senator Molson: What did you say the threshold quantity of gas was in the Arctic?

Hon. Mr. Macdonald: It is estimated, senator, that around 20 trillion cubic feet would justify this. Again, it is a matter of estimates from their drilling program to date, but 12 to 13 trillion is what they have found.

Senator Molson: They are at approximately the halfway mark.

Hon. Mr. Macdonald: Yes.

Senator Cook: Excuse me, Mr. Minister. What is the threshold figure you gave?

Hon. Mr. Macdonald: The threshold figure is around 20 trillion cubic feet. They are currently at 12 to 13 trillion. Just by way of setting those into comparison, the natural gas report that I tabled the other day showed that the gas reserves now, essentially, In Alberta, northeastern Brithis Columbia and the southern Northwest Territories and the Yukon, aggregate about 60 trillion cubic feet, so you can see that the addition of 12 to 13 trillion cubic feet—and it goes up to 20 trillion in Panarctic—is a rather significant addition to Canadian supplies.

In relation to the area involved, the amount of exploration done there has been minimal for dollars and cents reasons, so that it is not without some optimism that they look over their assets, I think, and feel that over time they can develop a major gas field.

The Chairman: Are there other questions?

Senator Connolly: No. That is very interesting.

The Chairman: Is there anything else you want to add, Mr. Minister?

Hon. Mr. Macdonald: I do not think so, Mr. Chairman. I think that covers most of the main questions that have been much debated.

The Chairman: The only thing I am thinking about is that you have two areas, namely, the Arctic and the offshore.

Hon. Mr. Macdonald: Yes.

The Chairman: Is there going to be a parallel development?

Hon. Mr. Macdonald: Well, at the moment the Arctic one looks like the one that has the pride of interest, if only because the private sector is most actively involved there. I think that one of the offshore areas that we will be taking a close look at is the Labrador shelf. I would not want to frighten any of the existing companies by saying

this, but if the consortium that is now operating there, or perhaps BP, were to come forward to this management in due course and say, "We are going to the next stage. It is very costly stuff. We think you should be involved in it," we would then hope that the Petro-Canada management would take a very hard look at that, because the east coast offshore is very attractive from the standpoint of meeting the demands of the Canadian market.

Senator Cook: In St. John's, for example?

Hon. Mr. Macdonald: Of course, it is important to put gas into St. John's, but it is also important to put it in around the whole perimeter of Canada.

Senator Connolly: Senator Cook, that is almost a conflict of interest you are talking about!

Hon. Mr. Macdonald: But, in effect, any finds of petroleum and natural gas can be very advantageous from the standpoint of meeting the security of supply concern that we have in eastern Canada.

The Chairman: I want to thank you very much for appearing here this morning, Mr. Minister.

Hon. Mr. Macdonald: Thank you for the opportunity to appear.

The Chairman: Do I have a motion, or are there any more questions? Shall I report the bill without amendment?

Hon. Senators: Agreed.

The Chairman: This is all the work we have for the moment.

The committee adjourned.

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FIRST SESSION—THIRTIETH PARLIAMENT
1974-75

THE SENATE OF CANADA

PROCEEDINGS OF THE

STANDING SENATE COMMITTEE ON

BANKING, TRADE AND COMMERCE

The Honourable SALTER A. HAYDEN, *Chairman*

Issue No. 53

WEDNESDAY, JULY 30, 1975

Complete Proceedings on Bill C-66 intituled:

"An Act to amend the Excise Tax Act"

REPORT OF THE COMMITTEE

(Witnesses: See Minutes of Proceedings)

29546—1

THE STANDING SENATE COMMITTEE ON BANKING, TRADE AND COMMERCE

The Honourable Salter A. Hayden, *Chairman*

The Honourable Senators:

Barrow	Hayden
Beaubien	Hays
Buckwold	Laird
Connolly (*Ottawa West*)	Lang
Cook	Macdonald (*Cape Breton*)
Desruisseaux	Macnaughton
Everett	McIlraith
*Flynn	Molson
Gélinas	*Perrault
Haig	Sullivan
	Walker—(19)

**Ex officio* members

(Quorum 5)

Order of Reference

Extract from the Minutes of the Proceedings of the Senate, July 30, 1975:

"Pursuant to Order, the Honourable Senator Macnaughton, P.C., moved, seconded by the Honourable Senator Greene, P.C., that the Bill C-66, intituled: "An Act to amend the Excise Tax Act", be read the second time.

After debate, and—
The question being put on the motion, it was—
Resolved in the affirmative, on division.

The Bill was then read the second time, on division.

The Honourable Senator Macnaughton, P.C., moved, seconded by the Honourable Senator Greene, P.C., that the Bill be referred to the Standing Senate Committee on Banking, Trade and Commerce.

The question being put on the motion, it was—
Resolved in the affirmative."

Robert Fortier,
Clerk of the Senate.

Minutes of Proceedings

Wednesday, July 30, 1975
(69)

Pursuant to adjournment and notice the Standing Senate Committee on Banking, Trade and Commerce met this day at 2:30 p.m.

SUBJECT: *Bill C-66—"An Act to amend the Excise Tax Act".*

Present: The Honourable Senators Hayden, (*Chairman*), Beaubien, Connolly, (*Ottawa West*), Cook, Desruisseaux, Flynn, Laird, Macnaughton, McIlraith and Molson. (10)

Present, not of the Committe: The Honourable Senators Bélisle, Deschatelets, Lafond, Petten, Prowse and Yuzyk. (6)

In Attendance: Mr. E. Russell Hopkins, Law Clerk and Parliamentary Counsel and Mr. R. L. duPlessis, Legal Advisor.

WITNESSES:

Department of Finance: Tax Policy and Federal-Provincial Relations Branch:

Mr. M. A. Cohen, Assistant Deputy Minister;

Dr. J. R. Allan, Director, Personal, Commodity and Estates Taxes Division; and

Mr. H. L. Jones, Chief, Commodity Taxes Section, Personal, Commodity and Estates Taxes Division.

Revenue Canada:

Mr. M. P. Bourgeois, Director-General, Headquarters Operations Systems and Planning; Customs and Excise.

Following discussion and upon motion duly put, it was *Resolved* to report the said Bill without amendment.

At 3:15 p.m. the Committee adjourned to the call of the Chairman.

ATTEST:

Frank A. Jackson,
Clerk of the Committee.

Report of the Committee

Wednesday, July 30, 1975

The Standing Senate Committee on Banking, Trade and Commerce to which was referred Bill C-66, intituled: "An Act to amend the Excise Tax Act" has, in obedience to the order of reference of Wednesday, July 30, 1975, examined the said Bill and now reports the same without amendment.

Respectfully submitted,

Salter A. Hayden,
Chairman.

The Standing Senate Committee on Banking, Trade and Commerce

Evidence

Ottawa, Wednesday, July 30, 1975.

The Standing Senate Committee on Banking, Trade and Commerce, to which was referred Bill C-66, to amend the Excise Tax Act, met this day at 2.30 p.m. to give consideration to the bill.

Senator Salter A. Hayden (*Chairman*) in the Chair.

The Chairman: We have before us Bill C-66, an act to amend the Excise Tax Act. We have with us two witnesses whom honourable senators have met before, namely, Mr. M. A. Cohen, Assistant Deputy Minister of Finance, and Dr. J. R. Allan, Director, Personal, Commodity and Estates Taxes Division, Department of Finance.

I have always had doubts about how one can have an opening statement on a tax bill. I will resolve my doubts in this fashion, unless the committee votes otherwise: the witnesses are here, they are open for questions, and honourable senators may proceed with their questions.

Senator Flynn: Mr. Chairman, I would like to make an opening statement myself, to say that I regret that the minister could not find time to meet with us today. He has been very assiduous in the other place, and I do not see why he should not be here. I can understand that he is a little tired, but I regret his absence very much. There are some questions that I would have liked to put to the minister, which I can hardly put to the witnesses who are with us today, there is no doubt about that.

If it is only a matter of examining the technical aspects of the bill, I agree that we have the bill and we can proceed with that. But if we are going to deal with policies, these gentlemen would probably be capable but would be reluctant to reply to questions on policy. I regret, and I want to put it on the record, that the minister is not with us this afternoon.

The Chairman: Did you want to make that assumption, or do you want to ask the witnesses; or do you want to let the question be resolved when you ask a question? The chair may think it is a question related to policy.

Senator Flynn: Mr. Chairman, I have great confidence in your ability to decide whether it is policy or technique. However, I have some questions in mind which I cannot and will not put to the witnesses. That is why I want to express my regret that the minister is not here.

The Chairman: It is now in the *Hansard* report. Are we ready for questions?

Senator Flynn: I hope we are. If someone else has a question, I am willing to listen.

Senator Molson: I would like to ask a question about the suggested ease with which the 3 million refunds are going to be dealt with. Again, like the Leader of the Opposition, I am faintly in the policy bracket, because a bill of this sort, which contemplates the method of imposing this extra tax and inviting applications for refunds on the scale that this does, strikes me as being a very difficult way to go about tackling the problem, and one which I am sure would not willingly or cheerfully be untaken unless there was no other way out. I cannot ask the witnesses that question.

The Chairman: I think that question can be asked. I would not rule against it. Do you want to speak to that, Mr. Cohen?

Mr. M. A. Cohen, Assistant Deputy Minister, Tax Policy and Federal-Provincial Relations Branch, Department of Finance: Mr. Chairman, I am not sure of the question. Perhaps the honourable senator could put the question.

Senator Molson: No, I do not think I can. I think I put the question. I think my question was, not unreasonably, that in trying to achieve the result, this was a most difficult way to achieve it, because the complication of the application in dealing with the refunds is not one that normally would be sought.

Senator Beaubien: Is there any other way in which it might have been dealt with?

The Chairman: Senator Beaubien, could we start with this: What are the various methods that are used from time to time in dealing with refunds?

Senator Prowse: What options?

The Chairman: That is a question you can answer, Mr. Cohen.

Mr. Cohen: Mr. Chairman, in some respects it is easier to answer the other question than your question.

The Chairman: You can take your choice.

Senator Flynn: For the time being.

Mr. Cohen: In answer to all of the questions that have been put, there is no question that the refund mechanism that we have adopted is a troublesome one. One would wish that one could find a simpler way, but it is very difficult. Frankly, this was perhaps the only way available to us in this particular situation, the reason for that being that the excise tax, as honourable senators are aware, is a tax that is imposed at the manufacturers' level. In other words, the point at which this tax is imposed and collected is at the refinery level.

This bill, if passed, will impose a tax which will be, in the end, applicable only to certain categories, if you will, of retail purchasers, So, there is a gap. The tax is imposed at an earlier stage in the distribution system and then two stages later the government says that certain individuals, such as farmers, fishermen, truck drivers, taxi drivers, and what-have-you, should not have to bear that tax.

Because of that problem, one is driven, I think inexorably, into a refund type of mechanism.

The tax is imposed on all gasoline at the manufacturers' level, and two stages later in the distribution system the government is picking and choosing certain consumers of the gasoline and restoring them to the position that they would be in had there not been a tax imposed at the manufacturers' level. The tax, of course, would be passed on by the refinery through the wholesaler, dealer, and ultimately to those buying the gasoline. Because of that, we are in a very unusual situation of refunding money to individuals who have not borne the tax in a direct sense, but who have paid for it, in a sense, in the cost of the gasoline, because the tax is passed on in the cost of the gasoline. They are not the actual taxpayers.

During the debate in the other place—and we are all guitly of this, including the departmental officials—there was a great deal of reference to refunds as opposed to some form of exemption from this tax. It is virtually impossible to make exemptions when all gasoline is taxed at the refinery stage. One could not indentify at the refinery stage where the gas is going to go. Because of that, the government had to adopt a refund mechanism of one form or another. It will actually be refunding this money to people who had not paid it in a direct sense, but did pay it as part of the cost of the gasoline.

The Chairman: They would not have paid it as a tax.

Mr. Cohen: That is right. It is passed on to them and shows up in the cost of the gasoline.

Senator Molson: I think you have come very close to answering my question. It is a good answer.

Mr. Cohen: Perhaps I have gone too far!

Senator Flynn: The refunds, of course, if this bill is passed, will be made to those who are not supposed to be affected by this legislation. However, I note that there are many categories where presently the amounts expended on gasoline, for instance, are deductible as an expense for income tax purposes. These people, of course, would get the benefit of the income tax deduction if they were not entitled to a refund. Do you not think it would have been less complicated to leave that category alone and not provide for an exemption from the tax?

Mr. Cohen: The result of that, senator, would be that these people, roughly speaking, would bear half the additional cost. Taking the corporate tax rate as an example, which, in roung figures, is 50 per cent, and assuming that that is the universal tax rate, to have not refunded this additional cost to the farmers, the fishermen, the delivery men, or whatever, but simply to have left those individuals in the position of deducting their extra expense for gasoline, would have been, in effect, to have charged them five cents a gallon instead of ten cents a gallon. That decision was possible, but that is now getting into the area of a policy question.

Senator Flynn: I agree. In any event, I just wanted to point out that there is a problem. Those individuals who, under the Income Tax Act, cannot claim the refund and cannot claim a deduction for income tax purposes, are paying more, in fact, than any other class of individuals.

Mr. Cohen: They are paying ten cents a gallon more.

Senator Flynn: Yes, whereas others would be paying only five cents had the other method been chosen, and yet they are really contributing more.

The Chairman: That is, if they were individuals—

Senator Flynn: I understand that, Mr. Chairman. I am here to point out the discrimination, or the inequities, of this tax.

Mr. Cohen: If I may, senator, the policy decision—

Senator Flynn: I am not asking you to comment on the decision of the government in this respect. I can do that myself.

The Chairman: Yes, and you frequently do.

Senator Flynn: As often as I can.

Senator Connolly: Mr. Chairman, there was a good deal of discussion in the debate on second reading this morning about the situation where individuals are practically required to use their own transportation to get to and from their place of work, and that is said to be not a situation in which they would qualify for an exemption.

The Chairman: They do not qualify for an exemption under the Income Tax Act.

Senator Connolly: That is right. There are categories of people, such as professional people, who use their car for mixed purposes, personal and business, and very often these people work out an arrangement with Revenue Canada whereby a certain percentage of their annual mileage is attributable to business and is properly chargeable as a business expense.

Would that same mechanism apply to these people in respect of refunds and, assuming that it does, what evidence will they require to substantiate their claims? Will they need slips from the gas pumps, or that kind of thing?

Mr. Cohen: You have posed two questions, senator. The answer to your first question is, yes, the same principles that apply in the case of someone who uses his automobile partly for pleasure and partly for business, if I can use those two terms—

Senator Flynn: "Pleasure" is not necessarily appropriate.

Mr. Cohen: Well, partly for business and partly for non-business. We all recognize that it is not a pleasure to have to drive to work.

Senator Connolly: Or to take your mother-in-law for a drive!

Mr. Cohen: The same principles that apply in determining those prorations for income tax purposes will be used in determining how much of the total mileage one has driven is eligible for the refund.

The Chairman: I think that is inherent in the language of the bill. It uses the term "business purposes." Regardless of how you use your car, if you use it for some business purpose for some period of time, then you would qualify.

Mr. Cohen: Yes. The second question posed by Senator Connolly, I think, can be answered by saying that in order to establish how much you have driven in total, you will

have to have receipts available. I do not believe that it is the plan of Revenue Canada to require one to submit those receipts when filing, but to have them available in the event of an audit.

Senator Connolly: In the same way as you would have receipts available for business expenses.

Mr. Cohen: Yes.

The Chairman: Before we go any further, I have been informed that the minister is out of town. His parliamentary secretary is available, if the committee sees any purpose in putting questions of policy to him.

Senator Flynn: Perhaps he could answer some questions put by Senator Molson or myself, or others.

The Chairman: Perhaps we could continue with our questioning of these witnesses, at the conclusion of which the committee can decide whether or not it wishes to have the parliamantary secretary to the minister appear.

Senator Flynn: Agreed.

Senator Prowse: The main question arising from the debate on this bill is whether or not the method of having the people pay this tax at the pumps and then apply for a refund is the most effective way.

There are some procedures presently in use whereby one can make certain purchases without paying the sales tax, or some other tax. For example, if I were to buy a one-horse-power motor for a piece of woodworking equipment in my hobby shop, I would pay the full price plus all of the taxes. However, if I were to certify that I was buying that same motor for a chopper on my farm for use in chopping feed, I would not have to pay the sales tax on it.

The Chairman: Can I interrupt you? If you stop right there, you have to look at the major problem. The major problem is that when a businessman fills up the tank of his car at a pump he is not directly paying the tax. The tax has been paid at the manufacturer's level; it has already been paid, so this is a refund to him, because included in what he pays is some element that the manufacturer has put in there in the price he charges to the man who operates the pump.

Senator Flynn: I am not too sure of that. The tax is imposed on the consumer.

Mr. Cohen: No.

Senator Flynn: I thought it was collected from the distributor or the producer, but it is imposed upon the consumer.

Mr. Cohen: No, senator.

Senator Prowse: As opposed to that—

The Chairman: Wait a minute.

Senator Prowse: I was not quite finished.

The Chairman: But we have not yet had an answer to this question.

Mr. Cohen: The excise tax is imposed at the manufacturer's level. It is born by the consumer ultimately in the price he pays for things, but it is imposed at the manufacturer's level.

Senator Connolly: The manufacturer does not get any refund.

Mr. Cohen: Refund aside, I was answering Senator Flynn's question. This tax is imposed at the manufacturer's level. That is why it is considered an indirect tax.

Senator Flynn: It is rather subtle, don't you think?

Senator Prowse: Tax is imposed at the refinery on all gasoline. Is that correct?

Mr. Cohen: Exactly.

Senator Prowse: On the other hand, there is this situation in the province of Alberta, to deal with a situation I am aware of. There we have what we call purple gas for farms. There is no charge for the road tax for that. The ordinary tax used to be 18 cents. I do not know what it is now—somewhere around 13 cents or something less. They sell a purple gas, and if anybody is caught with that in a vehicle that is not entitled to have it they are in trouble. That is another device that could be used. How many other options did you look at before you finally adopted the particular one you did? I am talking about in a general way; I do not want a thousand and one.

Mr. Cohen: We considered as many options as we could think of, and obviously ended up with this one as the most feasible.

Senator Flynn: You did not end up with it. Someone else did, namely the government. It is a decision of the government.

The Chairman: He is talking about at his level.

Senator Flynn: He said he considered a lot of other options, but he does not say that he suggested to the government that there was only the one, which was adopted.

The Chairman: I am sure that all the options were passed on. Is that right?

Mr. Cohen: Yes.

Senator Flynn: Sure, but the decision was not made by him.

Mr. Cohen: No, indeed.

The Chairman: Senator Prowse, had you finished?

Senator Prowse: Yes. That was just the one question. I thought the two made a picture, and it seemed to me that the one picked is obviously the simplest.

Senator Bélisle: I would like to revert to the discussion we had this morning and again this afternoon about members of some of the professions being able to deduct, such as doctors, lawyers and priests. There have been many union contracts signed lately. Carpenters, electricians and others have had included in their contract a certain mileage allowance. Would this new legislation not be an incentive to them to ask their unions to reopen negotiations?

The Chairman: You mean, they collect in two places. First you say they can collect under their contract.

Senator Bélisle: Many of those contracts are based on the increased cost of living.

The Chairman: Mr. Cohen, do you have an answer to that?

Mr. Cohen: I suppose the answer is: Possibly; it may well be. It depends whether you are an independent contractor or an employee. As an independent contractor, even though embraced perhaps under some collective bargaining umbrella, you will get a refund. If you happen to be an employee with a fixed mileage allowance under a union contract, then you will not be able to get a refund for the use of a car to drive to work. Presumably under most of these contracts, even though you are an employee, if you are driving on company time the company is paying you for your mileage. The company itself may be paying your gas bill, in which event you will not bear it. However, in those cases where, for example, you have simply a flat mileage charge to cover your gas, maintenance, oil change, as the case may be, you may be facing an extra cost, and potentially, I suppose, employees could ask that the contracts be reopened. That is possible.

Senator Bélisle: Even government employees, who are limited to 19 cents a mile, may ask for an increase.

Senator Beaubien: What else is new?

Mr. Cohen: Now you have posed a conflict-of-interest question for me!

Senator Prowse: When I dirve my car some 60 miles to the airport to fly here, I am entitled to put in as my ground transportation charge, along with my airline ticket, 16 cents a mile. Would I be entitled to deduct for my gasoline usage in that case?

Mr. Cohen: Driving to work?

Senator Prowse: No, I am driving to catch an aeroplane.

Senator Cook: To go to work.

The Chairman: You are governed by whatever is the tariff for senators in relation to travel.

Senator Flynn: This is a good question.

Senator Connolly: But you get the whole thing as an expense.

Senator Flynn: If you get a refund on your travelling expenses at, say, 19 cents a mile, what will happen with that? Since you are entitled to travelling expenses by law, can you claim a refund for the additional tax you have already paid?

Senator Prowse: That is a good, specific question.

Senator Connolly: The government pays that, and I suppose it could claim.

Senator Molson: Yes, it is paying the mileage.

Mr. Cohen: We are ready to take a stab at that one. I am not sure precisely how arrangements work for senators, but I am advised that generally speaking for government employees the situation will be that the Treasury Board will, in effect—

Senator Prowse: It would get the money.

Mr. Cohen: They will end up by getting the refund, in effect. The government employees will not be forced to bear it. The mileage charge will be adjusted, so that government employees will not have to bear it, provided they are travelling in the course of their work.

Senator Flynn: What about the other employer who makes an allowance? How much can he deduct of the additional amount he has to pay?

Mr. Cohen: If he is paying the gasoline cost in the course of the business he is carrying on it will all be refunded to him.

Senator Flynn: To him? Entirely? I thought I read an answer by Mr. Basford saying that a proportion of this would be refunded to the employer, but not all. I thought it was five-eighths of a cent. Would that be correct?

Mr. Cohen: There is a Revenue Canada official here.

Mr. M. P. Bourgeois, Director-General, Headquarters Operations Systems and Planning, Customs and Excise; Revenue Canada: In this case there will be an order by the Governor in Council.

Senator Flynn: Yes, I know.

Mr. Bourgeois: Five-eighths of a cent per mile will be refundable to the employer, and the five-eighths of a cent a mile is based on 16 miles per gallon, on the average. Based on studies we have conducted, 16 seems to be fairly good, and we are recommending to the Governor in Council that the employer be reimbursed that five-eighths.

Senator Flynn: That may be your answer; the government would claim it in the case of members of Parliament.

Mr. Bourgeois: That is a different situation.

Senator Flynn: It is a rather technical operation, the government claiming a refund.

Mr. Cohen: That is the general situation for government employees. I do not know precisely how senators' arrangements work.

Senator Connolly: Clause 5 of the bill and section 47(1)(g) authorize the Governor in Council to make regulations. As I remember the original provisions of this clause, there was some mention of disabled persons being among those people who were exempt from this tax. That is a hard question to answer. What is the degree of disability, and how is it established for the purpose of refund? For example, take the case of a person who is still able to drive a car but is suffering from some disability; perhaps he is a paraplegic with a special mechanism to operate his car. Would that person be exempt? What about, for example, the case of a heart patient who can drive but really cannot use public transportation because of the effort involved? Perhaps these are two extreme examples.

The Chairman: Let us find out first, Mr. Cohen, are the words "disabled person" defined in the Income Tax Act?

Senator Flynn: No, no. Mr. Chairman, there is some confusion here. The act has been amended. This reference to the Income Tax Act has disappeared. Now it will be dealt with by an order in council, under the new subparagraph (g):

> a person of such other class of persons as the Governor in Council may by regulation prescribe,

That has not been defined.

Senator Connolly: Mr. Chairman, what I am saying is that there is now the broad basket clause. I may be wrong about my recollection of the initial print, but now you have the basket clause and the power to regulate. If the

question of disabled people comes up, I just repeat the question I asked and the examples I used, about the paraplegic and the heart patient.

Mr. Cohen: I have to get into a little background, senator, to answer this question, if you will bear with me for a moment. First of all, there never was a reference in the ways and means motion, or the bill, to the handicapped.

Senator Connolly: There was not?

Mr. Cohen: No, there was not. The history of this very briefly is that the ways and means motion tabled in the other house on June 23 read precisely as you now see it in subparagraph (g) of this clause. Then the bill was introduced in the house and the bill differed from the ways and means motion. The bill dropped the words you now see insubparagraph (g) and it simply said, for all practical purposes, persons exempt from paying income tax. Specifically it said "the class of persons exempt under Part I of the Income Tax Act." That does not involve the disabled or the handicapped, that reference did not embrace them.

There was a procedural discussion in the other place and the ruling from Mr. Speaker, and the upshot of it all was that in the other place, just yesterday, the minister tabled an amendment which in effect restored this bill to the language that the original ways and means motion contained, which is this power to exempt people by regulation.

The Chairman: If the minister establishes a class of disabled persons under (g), then that is a class that would qualify for exemption.

Mr. Cohen: That is correct, senator. What the minister said in the other place yesterday—and how this whole handicapped and disabled persons issue came to light—was that that matter was discussed as to whether handicapped people should be completely exempt from the tax or whether they should be exempt insofar as concerns driving to and from work. There were a number of alternatives debated on the issue in the other place. The minister said in the house yesterday that he undertook to consider whether or not he would be able to find a feasible way of addressing this problem. His statement was as general as that. He did not commit himself to anything specific.

Senator Flynn: He very seldom does.

Mr. Cohen: For precisely that reason the kind of question you are raising, senator, will require a great deal of thought as to what is implied here. First of all, who is handicapped, how do you define it? We do not really define that in the Income Tax Act. There is a range of definitions in defferent pieces of legislation, and for different purposes one may or may not be considered handicapped.

Then there is the question of whether or not it should be a total exemption or an exemption for driving to work. Then it is a question where a person may choose to live, how far away he is. If he voluntarily has chosen to live a long distance away, notwithstanding that he is handicapped, it may be that exemption should not be extended. It is a question of whether or not public transportation is available and whether or not the nature of his handicap is such that he cannot use the public transportation, et cetera, et cetera. All I am doing is answering your question by raising questions, senator, in order to explain to you that the minister has not reached any view yet on whether and to what extent people who are handicapped will be entitled to a refund. But it is a matter to which he has undertaken to give very careful consideration and do the best he can in the situation.

Senator Prowse: I wonder if I might make this point at this time on this subject. If it is not there, I would suggest that maybe one would want to put something in the report on it. We have this type of thing come up with the veterans' organizations. There will be a disabled veterans' organization which will be on someone's neck, first of all. Then there are a whole lot of paraplegic and other, organizations who are going to be very upset about this. It will be a question as to whether this guy drives a long distance or a short distance, whether we are going to take him for the full tax or the full amount he drives or the little bit he drives. We are talking about some infinitesimal amount of what we have got, and eventually you are going to have public opinion pushing you to the point where you are going to have to make concessions. I would suggest that right now it should be clearly stated that the minister proposes to make this exemption as broad and as reasonably fair as it can be for people of the character involved.

The Chairman: I understand that was his statement in the house.

Senator Prowse: If this statement is made and it is made clearly and is an amendment, very well, but let us not worry about the two bits because whether a fellow drives 30 miles or two miles we are talking peanuts.

The Chairman: Senator Prowse, the answer to the point that you are making now is this. All Mr. Cohen was doing was speculating on the various problems tthat might arise and would have to be considered. He has not said positively that this is one that will be done. All he has said is that these are all the different factors that will have to be taken into consideration.

Senator Prowse: All I am saying is this, that when you are a long time in politics you have to answer for things eventually. When you first make the proposal to government that they should make a concession without exception, at all levels of government the answer is that there are a whole lot of problems, but eventually the problems are talked out the window and they do it and nobody has any trouble from then on. I am suggesting that we set a record and do it first instead of waiting until we get everybody mad at us before we even try.

The Chairman: Well, we have noted that.

Senator Desruisseaux: This morning there was reference made to the cost of administering possible refunds. According to what was said, it would be one per cent. First, it was questioned this morning whether it could be so low, that it would probably be much more. Just for our satisfaction, would you try to clarify what you see now?

Senator Flynn: Or contradict.

Senator Desruisseaux: It could be.

Mr. Cohen: All I can say about it, senator, is that the best estimate of Revenue Canada is that that is what it will cost to administer, not just the refund issue but the tax.

Senator Desruisseaux: How do you gauge these things?

Mr. Bourgeois: Tax rebates, such as those referred to in the bill, are made by the use of a computer. The cost would be approximately one per cent of the total revenue that is going to be generated by the tax. That is going to be the cost of administration.

Senator Desruisseaux: What percentage of the users of gasoline will be affected by the refund?

Mr. Bourgeois: The users of gas or the total purchases?

Senator Desruisseaux: Yes.

Mr. Bourgeois: Approximately one-third of the people paying the tax will be entitled to a refund. Approximately 31 to 32 per cent, in other words, one million claimants. To be exact, 985,000 persons would be entitled to qualify. That includes fishermen, farmers and business people. The biggest group actually will be the farmers. We estimate 300,000 farmers, 46,000 fishermen, 40,000 business people, and corporations and charitable organizations and so on. This comes to a total of about 985,000. Let us remember that the system is going to be processed with the use of a computer which is geared in such a way that the program indicates how to stop abuses. It is only those people with respect to whom we notice abuses that we are going to be auditing.

Senator Desruisseaux: But the computer is only as good as the man operating it, and no more.

Mr. Bourgeois: We have reviewed the situation and have put in fairly good safeguards, sir. You must remember that the average person or the average claimant will not be claiming large amounts of money, and that is an actual difference between this tax and others.

The Chairman: Senator Desruisseaux, I can certainly tell you that I will not be operating the computer.

Senator Flynn: Mr. Bourgeois, what would be the amount collected if there were no exemptions?

Mr. Bourgeois: $725 million.

Senator Flynn: And, in terms of the exemptions, how much are you going to refund?

Mr. Bourgeois: $170 million, sir.

Senator Flynn: In other words, about 25 per cent.

Mr. Bourgeois: Closer to 30 per cent, sir, I believe.

Mr. H. L. Jones, Chief, Commodity Tax Section, Personal, Commodity and Estates Taxes Division, Department of Finance: Just to give you those numbers, it is $525 million on a full year, with $170 million of refunds, for a total tax of $695 million.

Senator Flynn: That is based on the assumption that the tax will not decrease the consumption.

Mr. Cohen: That is right, senator. First of all, let me say to you that these are estimates. It is difficult to project in the future the precise amount of consumption of gasoline. Therefore, these are estimates and there is a margin of error in them, undoubtedly. Secondly, the costing was done on the assumption that there would be no change in behaviour.

The Chairman: Senator Flynn, I have just learned that Mr. Cullen is still over in the House of Commons. We have asked him to come here, but he has not arrived yet.

Senator Flynn: Then let us just proceed.

The Chairman: Very well, we will proceed.

Senator Flynn: If you wanted the same results without any exemption, what would be the proportion of the ten cents that you would have to impose?

Mr. Cohen: That is a difficult question, senator.

The Chairman: Well, take a running broad jump at it, please.

Mr. Cohen: On gasoline alone?

Senator Flynn: Yes. On the ten cents would it be seven cents, six cents, five cents, or what?

The Chairman: Should you add, Senator Flynn, "if you want to achieve a certain amount of income"?

Senator Flynn: That is right. I assume that is the government's main purpose. Certainly, the conservation aspects of the bill are not convincing nor established.

Mr. Cohen: Well, as the chairman has suggested, I will take a running jump at it. I would say that it would be in the neighbourhood of seven cents across the board for all gasoline.

Senator Flynn: If you add that seven cents, all those who are able to deduct that from their expenses under the present income tax regulations would be approximately in the same position as they are under this bill.

Mr. Cohen: I am not sure I follow you, senator.

Senator Flynn: If everyone was paying seven cents, those who are exempted under this clause—except, of course, those contemplated by paragraph (g)—would in all cases be able to deduct that additional cost of gasoline from their income as a deductible expense.

Mr. Cohen: Oh, yes.

Senator Flynn: That would be a simpler way of dealing with the problem.

The Chairman: It might, senator, but then you would have other problems, too.

Senator Flynn: Of course, we always have a choice of problems.

The Chairman: I would suggest that, unfortunately, quite often we do not have a choice of problems; we are just presented with them.

Senator Flynn: You mean today we have no choice! I agree with that.

Senator Yuzyk: It was suggested this morning that the revenue from the gasoline would be of some relief to those who use fuel at home. What is the application of that?

Mr. Cohen: Well, senator, one might argue that this tax is helping to reduce a deficit we are now experiencing in what we call the "oil account", and that is the difference between the yield of the export charge and the cost of subsidizing eastern Canadian imported consumption, all of which is designed to generate a single, national price well below world prices. Because this tax is only applying on the use of gasoline—and non-business use at that—it is in that sense that Canadians are able to purchase home heating fuels, oil and gasoline, at the lower national, single

price, and it is in that sense that this tax is helping Canadians to be able to buy home heating oils at a much lower price and at a constant cost across the country, subject to transportation.

The Chairman: Are you ready for the question?

Senator Flynn: Which question?

The Chairman: Have I a motion? Shall I report the bill without amendment?

Senator Flynn: Do you think we have shown all the faults of this bill in so short a period of time, Mr. Chairman?

The Chairman: I thought the combination of your speech this morning, Senator Flynn, and what you have said this afternoon was quite complete.

Senator Flynn: You think I should be satisfied with that?

The Chairman: I would think so.

Senator Flynn: All right, if you say so.

The Chairman: Are you ready for the question? Those in favour? Contrary, if any? Carried. I shall report the bill without amendment. The meeting is adjourned.

The committee adjourned.

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1974-75

THE SENATE OF CANADA

PROCEEDINGS OF THE

STANDING SENATE COMMITTEE ON

BANKING, TRADE AND COMMERCE

The Honourable SALTER A. HAYDEN, *Chairman*

Issue No. 54

WEDNESDAY, OCTOBER 22, 1975

Seventh Proceedings on:

"The *Subject-Matter* of Bill C-60, Bankruptcy Act, 1975"

(Witnesses: See Minutes of Proceedings)

29633—1

THE STANDING SENATE COMMITTEE ON BANKING, TRADE AND COMMERCE

The Honourable Salter A. Hayden, *Chairman*

The Honourable Senators:

Barrow	Hays
Beaubien	Laird
Buckwold	Lang
Connolly (*Ottawa West*)	Macdonald (*Cape Breton*)
Cook	Macnaughton
Desruisseaux	McIlraith
Everett	Molson
*Flynn	*Perrault
Gélinas	Sullivan
Haig	Walker—(19)
Hayden	

**Ex officio* members

(Quorum 5)

Order of Reference

Extract from the Minutes of the Proceedings of the Senate, May 13, 1975.

"The Honourable Senator Hayden moved, seconded by the Honourable Senator Bourget, P.C.:

That the Standing Senate Committee on Banking, Trade and Commerce be authorized to examine and report upon the subject-matter of the Bill C-60, intituled: "An Act respecting bankruptcy and insolvency", in advance of the said Bill coming before the Senate, or any matter relating thereto; and

That the Committee have power to engage the services of such counsel, staff and technical advisers as may be necessary for the purpose of the said examination.

After debate, and—
The question being put on the motion, it was—
Resolved in the affirmative."

Robert Fortier,
Clerk of the Senate.

Minutes of Proceedings

October 22, 1975
(70)

Pursuant to adjournment and notice the Standing Senate Committee on Banking, Trade and Commerce met this day at 9:30 a.m.

SUBJECT: Subject-matter of Bill C-60—Bankruptcy Act, 1975.

Present: The Honourable Senators Hayden (*Chairman*), Barrow, Beaubien, Buckwold, Connolly (*Ottawa West*), Flynn, Laird, Lang, McIlraith, Molson, and Walker. (11)

In Attendance: Mr. David E. Baird, Advisor to the Committee.

The Committee *resumed* its examination and analysis of the provisions of the subject-matter of the above Bill, assisted by Mr. Baird.

Following discussion, it was *agreed* that the Officials of the Department of Consumer and Corporate Affairs be invited to attend the next meeting of the Committee respecting Bill C-60.

At 10:10 a.m. the Committee adjourned to the call of the Chairman.

ATTEST:

Frank A. Jackson,
Clerk of the Committee.

The Standing Senate Committee on Banking, Trade and Commerce

Evidence

Ottawa, Wednesday, October 22, 1975.

The Standing Senate Committee on Banking, Trade and Commerce met this day at 9.30 a.m. to consider the subject matter of Bill C-60, respecting bankruptcy and insolvency.

Senator Salter A. Hayden (*Chairman*) in the Chair.

The Chairman: Honourable senators, I think I can safely announce that this meeting, unless some honourable senator has a lengthy speech to make, will not be very long. There are two subjects with which we have not dealt in our explanation of all the various provisions of Bill C-60, one being how banks are dealt with and the other one being how insurance companies are dealt with. We had divided that task between our two experts, Mr. Baird dealing with the banks and Mr. Zwaig with the insurance companies. However, Mr. Zwaig has been called to a greater effort this week. He is in Amsterdam representing his Canadian partnership at what is called an international partnership meeting. For that reason, I undertook to excuse him. Mr. Baird is prepared to deal with the position of the banks, but that will not take very long.

The real purpose for the meeting this morning is that I think we are at the stage where we should hear from the departmental representatives. One reason for that is that the briefs from the important areas of the public, such as the Canadian Bar Association, the Institute of Chartered Accountants, the Toronto Board of Trade, the Bankers' Association, I am advised, because of the procedures those associations have to follow in order to get a clear approval, will not be available to be submitted to us until about the third week of November. Therefore, I think we should go ahead and hear the departmental representatives. I told these people that if by the third week of November we are at the stage where we are considering the bill, they can make their presentations then, and while we would like to have their briefs before us, we are not going to sit around and wait. I think it is time we got the views of the departmental officials.

Senator Laird: Mr. Chairman, has the Association of Bankruptcy Trustees—I think that is what they call themselves—requested to be heard.

The Chairman: No, it has not. Mr. Baird, in association with Mr. Zwaig, has prepared a summary dealing with all the various points of the subject-matters in the bill which we discussed at our earlier meetings. In some cases, we approved; in others, we disapproved. The summary indicates the page references to the proceedings of the committee where these matters were discussed. That summary will be distributed to members of the committee, and the information contained therein, I think, will prove very valuable when we get to the stage of questioning the departmental officials.

Another item that will be distributed is a letter which was received from the Department of Consumer and Corporate Affairs of the Province of Alberta, which is administering what is called the Orderly Payment of Debts Act.

Honourable senators may recall that in Part X of the present Bankruptcy Act there is provision whereby any province which sees fit may adopt legislation called the Orderly Payment of Debts Act. This letter sets out the experience of the Province of Alberta in the administration of that act and how the exemptions work. The Orderly Payment of Debts Act in the Province of Alberta is only on the basis of extension of time for payment. Isn't that right, Mr. Baird?

Mr. David Baird, Adviser to the Committee: That is correct.

The Chairman: Apparently, the Superintendent of Bankruptcy has been in discussion with the Alberta people and has suggested that he is prepared to designate certain provincial government employees as deputy bankruptcy administrators for purposes of carrying on that phase. I think when the departmental officials are before the committee, we could get a thorough understanding of the exemptions provisions. The question is whether the exemptions provided in the bill are proper, or whether the provincial exemptions should govern—and I am talking about garnishees, and things of that kind—and certainly in dollar terms the exemptions under the provincial legislation of Alberta are much broader than what is in the present bill.

Just to give you an idea, the Minister of Consumer and Corporate Affairs for the Province of Alberta had the following to say:

> The thrust of exemptions legislation is to permit a basic maintenance posture upon which to rebuild one's affairs. It is to this end that Alberta has enacted exemptions legislation which provides for the exemption of an $8,000.00 equity in a home, $2,000.00 in furniture, certain agricultural implements, $2,000.00 for a car, $3,000.00 for a mobile home and the like. It is sometimes suggested that these levels are too generous, but the cut to the $3,000.00 level—

That is what the bill provides.

> —in the interests of national uniformity smacks of harshness.

I think the minister recognizes that these exemptions disregard the position of the creditor to a greater extent than they should.

At the end of this letter the Alberta minister says:

> Three thousand dollars is an insignificant amount of property to retain as a proper exemption. We recommend that this figure be increased substantially so

that it is more in line with our exemptions legislation or, to provide for separate and distinct value exemptions for real and personal property.

So somewhere in between the $3,000 exemption provision contained in the bill and the wide and varying range of provincial exemptions, perhaps, lies the answer.

Mr. Baird, would you say that the federal administration of these exemption provisions is more desirable than the provincial method?

Mr. Baird: No, I can see no advantage in federal administration. The provincial people are already administering the Orderly Payment of Debts Act, and their experience should be of great assistance in administering the provisions dealing with consumer arrangements under the new bill.

The Chairman: The point is that the federal authority will still retain control of it. If the federal authority designates the provincial administrators as being deputy bankruptcy administrators, it will still retain the overriding authority. In any event, I just wanted to raise that issue now to indicate that we have a lot of things to probe when we get the departmental officials before us. What I should like now is an indication, if the committee approves, that at the next meeting we invite the departmental officers to attend.

Hon. Senators: Agreed.

The Chairman: Mr. Baird has prepared a statement on the position of banks under this bill. Naturally, the secured creditors' position is a very important one. Go ahead, Mr. Baird.

Mr. Baird: Thank you, Mr Chairman. Honourabe senators, the material I will deal with today is material which was intended to be dealt with on the 16th of July, but we had run out of time. It deals with the provisions of Bill C-60 relating to banks. It was material handed out for the July 16th meeting.

Bill C-60, the new bill, does not specifically have a section dealing with banks and what happens when a bank goes bankrupt. However, there is a variety of clauses in the new bill relating to bankruptcy of banks. I know we are all hopeful that that occasion will never arise. There is the Canada Deposit Insurance Corporation and the Quebec Deposit Insurance Board to provide protection for depositors in the event of insolvency of a bank. The new bill clearly limits the administration of an insolvent or bankrupt bank. Clause 93 provides that a proposal may not be made in respect of a bank or other corporation if any of their deposits are insured by the Canada Deposit Insurance Corporation or guaranteed by the Quebec Deposit Insurance Board. Basically, this means that a bank is not entitled to make a commercial arrangement with its creditors. It is either in business or out of business. There is no half-way mark.

Clause 132 deals with involuntary petitions. It is not possible for an ordinary creditor to file a petition against the bank. A petition can only be filed by the Attorney General of Canada on the recommendation of the Minister of Finance. This means that banks are not subject to the possible blackmail of having a small creditor, one which owed about $1,000, come along and file a petition against the bank, which could create a tremendous amount of very bad publicity. A petition in bankruptcy can only be filed by the Attorney General of Canada. I think this is important protection because banks are a most important institution in our country and should not be subject to attack through a frivolous proceeding.

Senator Beaubien: Is that a new provision, Mr. Baird?

Mr. Baird: Yes, it is.

Senator Beaubien: It is something which was not in the act before?

Mr. Baird: Basically, the Bankruptcy Act as it now stands was never really intended to deal with banks. A corporation as defined under the existing Bankruptcy Act excludes an incorporated bank. Therefore, the existing Bankruptcy Act is not applicable to banks. So incorporating provisions relating to banks in the Bankruptcy Act is a new approach.

Senator Connolly: There is nothing in the Bank Act itself, is there, about the insolvency or bankruptcy of banks?

Mr. Baird: I can tell you in a moment, senator.

Senator Walker: I guess there has not been a bankruptcy, has there, Mr. Chairman, since the Home Bank. The Home Bank was the last insolvency.

The Chairman: Yes. I went through all that in my first job as junior counsel. That is a long time ago.

Senator Walker: With Mr. McCarthy?

The Chairman: Yes.

Senator Buckwold: Whom did you represent, Mr. Chairman?

The Chairman: I was prosecuting the directors.

Senator Walker: And you sent some of them to jail, I believe.

The Chairman: The only thing I learned out of that whole proceeding was how not to run a bank. It was an extraordinary thing.

Mr. Baird: To answer your question, Senator Connolly, there is provision in the existing Bank Act for an insolvency of a bank. It is not called a bankruptcy proceeding, but there is provision for an insolvency. Section 125 of the Bank Act provides for the appointment of a curator. It provides that the minister shall, if the bank suspends payment in the Bank of Canada of any of its liabilities as they accrue, forthwith appoint in writing a curator to supervise the affairs of the bank.

Senator Molson: That is not altered by this bill, is it?

Mr. Baird: Yes, it is. The provisions of the Bank Act no longer apply, but the provisions of the Bankruptcy Act would apply in the event of insolvency.

Senator Connolly: The Bank Act is pretty nearly due for revision, is it not?

Mr. Baird: Yes. I understand it is coming up in 1977.

The Chairman: Of course, under the bill we have before us the action in relation to the bankruptcy of a bank can only be instituted by the Attorney General of Canada.

Mr. Baird: Yes.

The Chairman: And in the appointment of a curator the Minister of Finance was the one who had the authority on the report of the Inspector. He had the power to appoint a curator. So the basic authority stems from—I was going to say from the same source, but after all I have to recognize that the Minister of Finance and the Attorney General of Canada are two different positions. But at least it is a government decision.

Mr. Baird: The filing of a petition in bankruptcy is based on the recommendation of the Minister of Finance. So I think their authority runs basically from the same source.

Senator Connolly: It runs right back to the Inspector General, really.

The Chairman: That is right.

Senator Walker: Why should we get it into this act? It is doing very well where it is.

Senator Connolly: It is broader now and I think it is an advantage to the banks to have it.

Senator Walker: Do they feel that?

Mr. Baird: We have not had any submissions from a bank on these specific provisions. I think they will be forthcoming.

The Chairman: Oh, yes.

Senator Connolly: To press Senator Walker's question, do you think the banks object to the new provisions of the Bankruptcy Act?

The Chairman: I would doubt it. I cannot go any further than that. They do have a brief. Apparently briefs from organizations of this sort have to go through quite a chain of command before they are released as a submission. One week ago I had been assured that we would have the brief from the Bankers' Association but the last step of consideration by the last in the line of succession on responsibility had not been completed. However, we may lose it in a couple of weeks.

Mr. Baird: The advantage of transferring provisions from the Bank Act to the Bankruptcy Act is, basically, that the Bankruptcy Act has a very formal structure, a more accepted structure for determining claims and for administration. Basically, the Bank Act appoints a curator and sets out priorities, but it does not have the basic skeleton or structure for administration purposes. On the other hand, the Bankruptcy Act has the basic structure—such as the procedure for disallowing claims and the right to go to court. In the Bank Act these things are left quite open and are not dealt with.

Senator Connolly: This is really a safety valve in the law in repect of bankruptcy and banks.

The Chairman: You have more ready-made machinery.

Mr. Baird: Specifically, the provisions in the Bank Act dealing with the appointment of a curator are going to be repealed. Clause 410, page 179 of the orange book, deals with the various other provisions which are going to be repealed, and one of them is the provision of the Bank Act appointing a curator. The Bank Act does not have sufficient procedures for administering an insolvency situation. It has the rights and the priorities, but very little more.

Clause 255 of the new bill deals with the priority of payment when a bank is insolvent, and it is basically very similar to the existing one, section 124 of the Bank Act. It provides, of course, very correctly, that the debts or obligations incurred by the interim receiver or trustee in carrying on the business of the bank should be paid first, the costs of administration should be paid second, and then it deals with:

> (c) the payment of the notes issued by the bank, intended for circulation in a country outside Canada and then outstanding, exclusive of those in respect of which payment has been made—

to a designated authority in that country.

When I came upon this section I wondered what it meant, because I was under the impression that a Canadian bank could not issue its own notes, and that it had to use Bank of Canada notes. This is the law at the present time. However, in the past, Canadian banks have been entitled to issue notes for use in foreign jurisdictions, and this is where this provision applies. If there are notes outstanding that have been used for circulation in a country outside Canada, these are intended to be paid third. Of course, this is to maintain the integrity of the Canadian banking system in the eyes of foreign people.

The Chairman: If you are interested in the sections of the Bank Act, section 73 is the one that deals with the issue of notes by the bank in circulation outside Canada, and I would interpret it as being in the past tense, because I doubt if that is a practice that is going on today. Section 75 of the Bank Act is the general prohibition against banks issuing notes.

Senator Connolly: Does section 75 apply to notes issued domestically as well as abroad?

The Chairman: No. There is a general prohibition in section 75.

Senator Connolly: It covers both, then?

The Chairman: Yes.

Mr. Baird: I interpret it to cover both foreign and domestic notes.

Senator Connolly: There may still be outstanding notes abroad?

The Chairman: Yes.

Senator Connolly: Supposing there are outstanding notes within Canada?

Senator Beaubien: They are in museums.

The Chairman: I think the only place you might find those would be in coin collectors' albums.

Senator Molson: Was there not a time limit imposed when the right to issue notes was abrogated?

Senator Beaubien: In 1934.

Senator Molson: There was a limit after which they were of no validity.

Senator Connolly: I would think they covered themselves that way. However, we are not dealing with the Bank Act. I guess we are getting off the track, Mr. Chairman. I started this. I apologize.

Mr. Baird: If the notes ended up in Canada we would be all right, because the reference is to notes intended for circulation in a country outside Canada. It could have been that they were intended to go outside and then come back to Canada and be honoured.

The next priority is:

> (d) the payment of any amount due to Her Majesty in right of Canada, in trust or otherwise, except indebtedness evidenced by bank debentures;

Basically, money on deposit owing to a government would be the next priority. The priority after that is money on deposit owing to a province, and after that deposit liabilities. Below deposit liabilities we have the priority of bank debentures, and after that we have ordinary creditors.

This is the general order of priority if, which heaven forbid, we ever have a bankruptcy of a bank.

Senator Molson: Yes. God forbid.

The Chairman: Well, it is not information that you are likely to be called upon to use very often. I would think the banking system is pretty solid.

Senator Molson: Hopefully.

Mr. Baird: There is additional protection in clause 292, which provides that if a bank is bankrupt the inspector general of banks, or his nominee, is a member *ex officio* of any board of directors established in respect of such a bankruptcy. This gives the Minister of Finance direct representation on the board of inspectors. The problem with this section is just the problem of vagueness or ambiguity. What is meant by the words *"ex officio"*? Does such a representative have all the powers of a normal inspector? Or has he just the right to sit in without the right to vote? I think this is an issue that should be clarified. I think he should be given all the powers of a normal inspector in a bankruptcy. The right to sit in without the right to vote is a meaningless right and will not give the Minister of Finance the power or protection that he should have.

The Chairman: I think "*ex officio*" is an expression that is very freely thrown around, but what is intended by it is that the person concerned has the same rights as the body he is related to. If he is told, "*ex officio* you have this position," then he is told, "You have all the authority of that position."

Senator Laird: For example, Mr. Chairman, Senator Flynn is a member of this committee *ex officio*. He would certainly take it amiss if he were not allowed to vote.

The Chairman: And certainly, if he were told that his *ex officio* position did not entitle him to vote, I can imagine what would happen.

Senator Flynn: I would not be here.

Senator Walker: Our caucus would protest at once.

The Chairman: Go ahead, Mr. Baird.

Mr. Baird: That is all, Mr. Chairman.

The Chairman: Very well. We have now finished the sections of the bill that deal with banks, but the main thrust of the bill, I would think, anticipating the submissions that the banking association may make, would be on the question of the secured creditor position, and the position of the priorities in respect to wages; but I do not think we should anticipate that. When they come along we will hear them.

We dealt with several things before some senators came in this morning. The committee approved of inviting the departmental officers to appear next week. I have been constantly in touch with the responsible organizations who are proposing to make submissions, and who have indicated that they were working on them. Such as the Canadian Bar Association, the Institute of Chartered Accountants, the Toronto Board of Trade, the Canadian Bankers' Association, and so on; but the information I get is that they would not have cleared all the positions on which they have to make submissions before perhaps the third week in November. While I did not undertake to hear them on behalf of the committee, I said that if we were still hearing submissions, and still dealing with the bill in some form or other, we would hear them.

The only subject matter we have not dealt with in the bill, and Mr. Zwaig can deal with it in a few minutes the next time he is here—he is not available today—is the position of insurance companies. We may hear that in the course of hearing the departmental officials next week. That will complete our hearings.

How far this bill is going to proceed before the next recess is a question on which your guess is as good as mine. It has been tabled in the House of Commons, but I cannot say whether there is any particular priority attached to it at the moment.

I am also going to have distributed to members of the committee today a summary which we have prepared on the subject matter together with a reference to the transcript of the proceedings of this committee where these items are discussed, and showing the views expressed by our experts and by members of the committee. In this way you can quite easily become reasonably familiar with the point raised, and you may also wish to use it as a basis for questioning the departmental officials.

So now, honourable senators, unless some member of the committee has some further questions, it would appear that this is the time to adjourn.

Senator McIlraith: Before you put the motion, Mr. Chairman, you mentioned a meeting next week. If the Senate does not have legislation before it and is therefore not sitting, will the committee sit?

Senator Flynn: The Combines legislation bill will be before the Senate. We are starting second reading today and continuing next week.

The Chairman: I understand that so far as the Competition Bill is concerned, second reading will proceed only to the extent of an explanation of the bill, and then there will be an adjournment which I would expect would be until next week because Thursday seems to be taken up with the subject matter of the notice given by the Leader last evening. So long as the Competition Bill is before the Senate and there is some element of urgency attaching to it, I do not think we can consider the eventuality of our not sitting. However, I am not the leader.

Senator Walker: Then we proceed on the assumption that we will be sitting.

The Chairman: We will be sitting, and we will be dealing with the Bankruptcy Bill.

The committee adjourned.

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FIRST SESSION—THIRTIETH PARLIAMENT
1974-75

THE SENATE OF CANADA

PROCEEDINGS OF THE

STANDING SENATE COMMITTEE ON

BANKING, TRADE AND COMMERCE

The Honourable SALTER A. HAYDEN, *Chairman*

Issue No. 55

WEDNESDAY, OCTOBER 29, 1975

Eight Proceedings on:

"The *Subject-Matter* of Bill C-60, Bankruptcy Act, 1975"

(Witnesses: See Minutes of Proceedings)

29635—1

THE STANDING SENATE COMMITTEE ON BANKING, TRADE AND COMMERCE

The Honourable Salter A. Hayden, *Chairman*

The Honourable Senators:

Barrow	Hays
Beaubien	Laird
Buckwold	Lang
Connolly (*Ottawa West*)	Macdonald (*Cape Breton*)
Cook	Macnaughton
Desruisseaux	McIlraith
Everett	Molson
*Flynn	*Perrault
Gélinas	Sullivan
Haig	Walker—(19)
Hayden	

**Ex officio* members

(Quorum 5)

Order of Reference

Extract from the Minutes of the Proceedings of the Senate, May 13, 1975.

"The Honourable Senator Hayden moved, seconded by the Honourable Senator Bourget, P.C.:

That the Standing Senate Committee on Banking, Trade and Commerce be authorized to examine and report upon the subject-matter of the Bill C-60, intituled: "An Act respecting bankruptcy and insolvency", in advance of the said Bill coming before the Senate, or any matter relating thereto; and

That the Committee have power to engage the services of such counsel, staff and technical advisers as may be necessary for the purpose of the said examination.

After debate, and—
The question being put on the motion, it was—
Resolved in the affirmative."

Robert Fortier,
Clerk of the Senate.

Minutes of Proceedings

Wednesday, October 29, 1975
(71)

Pursuant to adjournment and notice the Standing Senate Committee on Banking, Trade and Commerce met this day at 9:30 a.m.

SUBJECT: *Subject-matter of Bill C-60—Bankruptcy Act, 1975.*

Present: The Honourable Senators Hayden, (*Chairman*), Barrow, Beaubien, Connolly (*Ottawa West*), Cook, Desruisseaux, Flynn, Hays, Laird, Lang, Macdonald (*Cape Breton*), McIlraith, Molson and Walker. (14)

Present, not of the Committee: The Honourable Senators Smith (*Colchester*) and Lafond. (2)

In Attendance: Mr. David E. Baird and Mr. Melvin C. Zwaig, Advisors to the Committee.

WITNESSES:

Department of Consumer and Corporate Affairs:

Mr. John Howard, A.D.M. Corporate Affairs;

Mr. Raymond Landry, Superintendent of Bankruptcy;

Mr. Arnold Landis, Ass't. Superintendent, Private Administration;

Mr. Yves Pigeon, Ass't. Superintendent, Federal Administration; and

Mr. René Cyr, Ass't. Superintendent, Detection & Investigation.

Department of Justice:

Mr. Moe Prabhu, Senior Legal Advisor, Bankruptcy Sector;

Mr. Steve Kleiner, Legal Counsel, Bankruptcy Sector; and

Mrs. Jacqueline Dubois, Legal Counsel, Bankruptcy Sector.

The Departmental officials proceeded with an audio-visual presentation relating to the above subject-matter, followed by a statement by Mr. Howard.

Mr. Howard and Mr. Landry then responded to questions relating to various aspects of the above Bill.

At 11:50 a.m. the Committee adjouned to the call of the Chairman.

ATTEST:

Frank A. Jackson,
Clerk of the Committee.

The Standing Senate Committee on Banking, Trade and Commerce

Evidence

Ottawa, Wednesday, October 29, 1975.

The Standing Senate Committee on Banking, Trade and Commerce met this day at 9.30 a.m. to consider the subject matter of Bill C-60, respecting bankruptcy and insolvency.

Senator Salter A. Hayden (*Chairman*) in the Chair.

The Chairman: Honourable senators, we have before us this morning the departmental officials. Before we start, Mr. Zwaig has a correction that he wants to put on the record in conne -tion with a statement he made on a previous occasion.

Mr. Melvin C. Zwaig, C.A., Adviser to the Committee: Thank you, Mr. Chairman. In the proceedings of the committee of July 16, 1975, at page 49:8, I stated:

> A case in point was the Prudential Insurance case in Ontario, where apparently the provincial Superintendent of Insurance was aware of the financial problems well before the public became aware, and he was powerless to do anything for about 18 months.

I should have stated:

> A case in point was the Prudential Finance Corporation Limited case in Ontario where apparently the Ontario Securities Commission was aware of the financial problems well before the public became aware, and was powerless to do anything for about 18 months.

I apologize for any embarrassment I may have caused by that misstatement.

Senator Walker: Whom did that embarrass?

Mr. Zwaig: The Prudential Insurance Company.

The Chairman: Perhaps it is big enough that it would not have embarrassed it.

Senator Walker: I would think so, too.

The Chairman: Now then, we get down to the business of the meeting. Honourable senators will have noticed that there is a lot of paraphernalia here for the meeting this morning. I thought we might start our hearings with the departmental officials by getting some understanding from them of the way in which they intend to approach their presentation and possibly their interpretation of the provisions of Bill C-60. I understand we will first be shown some of the cartoons which were used, I expect, with the idea of promoting an understanding of the various provisions of the bill, following which there will be an opening statement.

You have before you this book entitled "Briefing Sessions," which was part of the material used by the departmental officials in the various seminars which they conducted. You do not have to read it at this time. I expect they will refer to some portions of it.

We are here to hear their explanaPions in connection with various portions of hte bill. We are not in the same position as those who attended the seminars. We are here, ultimately, to form our own conclusions. Ultimately that is what we will do.

Now, I should tell you first, we have here at the head table Mr. John Howard, who has been before us on previous occasions. He is the Assistant Deputy Minister of Consumer and Corporate Affairs. We have Mr. Raymond Landry, who is the Superintendent of Bankruptcy.

We have in the room as well various other officials seated along the back wall. That was their selection of position. Maybe they were looking for some reinforcement of their stature, but we are not that terrifying.

Mr. Howard, would you just introduce the various officials, please?

Mr. John Howard, Assistant Deputy Minister, Bureau of Corporate Affairs, Department of Consumer and Corporate Affairs: Yes, Mr. Chairman. Honorable senators, the first is Arnold Landis, the Deputy Superintendent in charge, essentially, of the private sector trustees administration. Second, Mr. René Cyr, the Assistant Superintendent in Charge of Detection and Investigation. Third, Mr. Yves Pigeon, who is in charge of what will be known as the Consumer Bankruptcy and Arrangement Division. Then we have Mr. Moe Prabhu, from the Legal Division. Mr. Steve Kleiner is also from the Legal Division, as is Madame Jacqueline Dubois.

The Chairman: Mr. Howard, as I understand the order of things today, at some stage, when we finish with what we call the seminar end of things, there is going to be an opening statement, possibly by Mr. Landry. Is that correct?

Mr. Howard: I was going to make a brief opening statement. I think he might want to follow.

The Chairman: All right.

Mr. Howard: We will leave it to you. When I come to my conclusion, I will list the topics that you had recommended earlier and perhaps you will want to change that at that time. Mr. Landry will give an opening on each of those specific topics, and then we will be open to questions.

The Chairman: All right. We start with the cartoons. If at any time you want to ask questions, we can simply tell the operator to stop and we will not run the film during the time the questions are being dealt with.

A film was projected.

The Chairman: I guess we can have a little more light on the subject now. This is only a part of the film that has been adduced. It seems to be pertinent and indicates, I would say—certainly to me—an administrative approach or feeling in connection with the functions and purposes of

the bill. However, we will get into that later. Mr. Howard, you were going to make an opening statement.

Mr. Howard: Thank you, Mr. Chairman. I will try to be reasonably brief in my opening. As I mentioned before, I will give a very general introduction. I am not going to recapitulate what we have set out in a number of general documents, including the detailed background paper that was distributed with the bill when it was tabled. Instead, I will try to focus on the bill from the point of view of a public sector program manager, so that you get into perspective the kind of workload we have in administering a bankruptcy system, the nature of that workload, and the resources we require in order to do it.

To do this, I would like to underline that, from the point of view of a program manager, the bankruptcy bill does contain some substantive provisions, particularly, of course, the priority section, which determines who gets what out of the assets recovered, and also what was mentioned on the film, the problem of directors' and officers' personal liability in the event where they have acted in their own interests, as distinct from the interest of the corporation, its creditors or shareholders.

On the whole, the bankruptcy bill sets out a very large array of administrative procedures. It is essentially an administrative act.

If you look at the seminar booklet that has been distributed to all members of the committee, you will notice that the particular character of it is the number of system flow charts, especially the last part of that book. It is not just that we design the flow charts and build a statute around them, but there is always an interaction between the two. We try to make sure that the statute does reflect the kind of efficient system procedures that are illustrated in the flow charts.

As I mentioned, a number of sub-systems are contained within the bankruptcy system itself. The first, of course, is the licensing of the private sector trustees. This is one of the unique characteristics of the Canadian law, the fact that for a long time we have delegated to private sector trustees the task of running estates. Indeed, under the statute, the assets of the debtor are vested directly in that private sector trustee, not in a public official, not even in a court receiver—although the trustee is in effect an officer of the court. It is, when compared with other bankruptcy systems around the world, a rather extraordinary procedure, but one which has worked well and one which the government decided before the bill was published should be continued.

In addition to that licensing, a major activity now is the administration of the public sector trustees who handle small debtor files.

A third major area of administrative responsibility concerns the auditing and the surveillance of private sector and public sector trustees. We have, in addition, an investigation and detection capability which enables us, when we receive complaints or when we suspect that there is something amiss within an estate, to go out and do a thorough investigation of it.

Finally, and perhaps one of the most important of all administrative responsibilities of the Superintendent is his responsibility to run a coherent information system so that not only the Superintendent knows but everybody who is intimately involved with the bankruptcy system knows what is happening throughout the system. At present this is largely done through a mechanical card system. We have already done some development work on a computerized file, which we hope will be ready within one or two years.

I will mention the computerized files again. The reason why the overall information system has not been completed is that we have other priorities, particularly in respect of the consumer arrangements.

Instead of discussing in the abstract the objectives of the bill, I want, in discussing the policies, to characterize them instead as specific problems as we perceived them and as we explained them to the government, and the actual response of the government in respect to those problems.

The first one, as mentioned on the film, is that we have a hodge-podge of laws. That is, various creditors' arrangements acts, the Winding-Up Act, the Bankruptcy Act and so on. Our response to that was to attempt to consolidate in one statute all of these laws, many of them archaic.

A good example of a practical problem is the problem of Mr. Landry and Mr. Arnold Landis, who is now a liquidator of IOS ltd., a federal corporation. The problem is that we floundered for several months attempting to assume control of IOS Ltd., although we knew there were persons taking assets out of that corporation, particularly from New York and Luxemburg, taking them to the Bahamas and then spinning them off from the Bahamas to various other corporations in Hong Kong and other exotic places. But because we had no clear law that applied to that problem, or clear provision in a law—either the corporation law or bankruptcy law that would have applied to that problem—it took us a considerable length of time to be able finally to do something under the Winding-up Act, which is the act under which Mr. Landis was finally appointed as a liquidator along with a co-liquidator from the private sector.

The second problem, from our point of view, was the almost complete disinterest of unsecured creditors in participating in the active management of bankruptcy estates. Because of the priorities of secured creditors and various crown agencies, not only for tax arrears but other kinds of contributions that are payable to crown, particularly crown insurance funds, there was usually very little, if anything, left for the unsecured creditors. As a result, the assumptions in the statute about control of the bankruptcy estate through the inspectors, who like a board of directors maintain some kind of surveillance over the trustee, was largely illusory. In fact, most of the responsibility was borne by the trustee, who would be working always under the aegis of the Superintendent, but who, nevertheless, got very little direction from the unsecured creditors.

What we have done in the bill, and this is certainly one of the most controversial things in it, is to delay and even to a certain extent subordinate secured creditor rights, to try to make sure that there would at least be some interest on the part of the unsecured creditors in the administration of these estates. One other thing that complements this is the provision with respect to receiverships. We are not attempting to displace the legal institution of the receivership or to render it impracticable, but we are trying to make it absolutely clear that a receiver, although appointed altogether outside of the Bankruptcy Act, whether a court appointed receiver or an extrajudicial receiver appointed under a trust deed, has a clear duty to report exactly what the status of the bankrupt's affairs are to a trustee or to the Superintendent.

A third major problem is related to proposals, and particularly commercial proposals, which is what we are talking about. There were some questionable tactics used, particularly so-called "defensive bankruptcies," where a corporation went into bankruptcy and stalled for a length of time in order to be able to put together an arrangement that it might be able to sell to its creditors. It was quite difficult from an administrator's point of view to know whether the debtor was really in good faith or whether he was just stalling. Of course, we hear complaints from both sides. Indeed, Mr. Landry and the other officers and I have spent a great deal of time in respect of a very large firm in Calgary that went through this defensive bankruptcy mechanism. While the officers and the principal shareholders of the corporation were putting together their arrangement, the bankruptcy just carried on and before they actually had their arrangement ready to submit to the inspectors, the inspectors had actually realized on the assets and the whole entity disappeared from under their feet. We were not just focussing on that case, but it is a good illustration of the kind of problem we are attempting to resolve in the part on commercial arrangments. In that respect we not only clearly legitimate the arrangement as a tool; in addition, we encourage it as a first alternative before bankruptcy is considered.

The fourth point I should like to underline is the tremendous shift of emphasis in the overall credit system. I will refer now to some data. I want to make clear that I am not referring at all to mortgage lending, particularly house lending. I am talking about consumer lending, particularly in respect of consumer durables or unsecured loans.

In 1950, a year after the present bankruptcy law was enacted, the outstanding non-mortgage credit was $1.22 billion. In 1960 it had not changed much. It had multiplied by four times, but that probably corresponded to the growth in the economy. In 1960 it had gone up to $4.02 billion. In 1970, probably reflecting changes in the Bank Act and the different attitudes of the banks and trust companies towards consumer lending, the total amount of consumer credit outstanding was $11.71 billion. Since 1970 up to the end of 1974 that amount has doubled to $20.56 billion, again reflecting the more aggressive lending attitudes of the banks and trust companies and probably also the greatly expanded use of tripartite credit cards. The tripartite credit cards are those such as Chargex or Master Charge, where the credit card issuer actually acts as an intermediary, absorbing the risk between the retail merchant and the customer.

Now, reflecting this tremendous shift in the credit system, we have attempted, in Part III of the bill, to set out a coherent and workable system of consumer arrangements—a system that will offer a useful alternative to bankruptcy—as a solution to individual debtor problems. The consumer bankruptcy will still be available to the individual, but as you have already noted in your earlier hearings here, because the exemption is only $3,000, rarely or ever will bankruptcy be an attractive solution to an individual unless he has very, very few assets indeed.

A number of people have criticized us for setting that figure too low. It may be too low, but the point we were trying to emphasize is that it should be low. If somebody has earning capacity and some assets, he should enter into an arrangement. Even if it is a composition where he only pays back, say, 10 to 20 per cent of his outstanding obligations, he should be forced to go through that routine, because from our point of view the best kind of rehabilitation is to compel somebody to go through a responsible planning exercise.

The Chairman: How did you fasten on $3,000? Is that just a number taken out of a hat?

Mr. Howard: It was largely a rule of thumb.

The Chairman: It could have been $5,000.

Mr. Howard: It could have been $5,000. We were so uncertain about it that we decided the Governor in Council, by regulation, should have power to increase that amount to make it more responsive to changing needs.

The Chairman: Did you consult the orderly payment of debts acts in the various provinces to get any lead from there?

Mr. Howard: The Orderly Payment of Debts Act is Part X of the present Bankruptcy Act, administered by the provinces. The exemptions themselves are normally under the provincial execution acts, and they determine what a judgment creditor can or cannot execute against. It varies greatly from province to province. In Alberta it is very, very generous compared to, say, Quebec or British Columbia, and as a result we, in arriving at $3,000, tried to establish a median that was consciously low in order to try to force people into arrangements.

The Chairman: I suppose the principle should be that the exemption should be high enough for the debtor to feel that he can make it.

Mr. Howard: Yes. We should like him to be motivated to stand on his own feet. A number of people have stated that what we have done is to take away so many assets, or leave him with such a small exempt base that he will not be motivated to live up to the obligations of the arrangement that is made for him.

Senator Connolly: Do you mind explaining that? I just do not follow the last statement you made.

Mr. Howard: Well, for example, in Alberta, I believe the total possible exemption under their execution act is close to, I believe, $12,000. Is that correct, Mr. Landry? It is close to that, anyway. It is relatively generous. Something like a $8,000 interest in a home is exempt.

Mr. M. Prabhu, Senior Legal Advisor, Bankruptcy Sector, Department of Justice: It is $16,000 total.

Mr. Howard: it is $16,000 total, is it? The only other jurisdiction I know that is that generous is probably California.

Mr. Prabhu: And Saskatchewan is similar.

Mr. Howard: We tried to hit a balance here where we would give a reasonable exemption under the Bankruptcy Act where the person was really at rock bottom, but—

Senator Connolly: Are these exemptions just stated in cash amounts, or are they physical things?

Mr. Howard: Usually the exemptions relate to things like furniture, interest in a home, tools that a workman uses in his employment, and so on.

Senator Connolly: They are all included?

Mr. Howard: Yes, and they are specifically referred to in the execution acts in the carious provinces. I should, how-

ever, make it absolutely clear that the $3,000 exemption in the Bankruptcy Act, of course, only relates to bankruptcy proceedings. If an individual debtor decides that he does not want to come under the Bankruptcy Act, then of course he can rely on his provincial exemptions to render him immune from an attack by a judgment creditor in that province, and all we are saying is, if you want to come under the Bankruptcy Act you had better be prepared to give up most of your assets and go into an arrangement.

Senator Flynn: Even though he has inherited under the condition that he would not be subject to seizure.

Mr. Howard: We have not tried to resolve the problem of what is commonly called the "spendthrift trust" in the common law system, where somebody in effect inherits a life interest, or under a substitution, in Quebec, an amount of money that simply is not subject to seizure. Now, they are not his assets, of course, and in very careful family planning—

Senator Flynn: He gets the money occasionally.

Mr. Howard: He gets the money occasionally. To a certain extent we cover that problem, because so long as he has the status of a bankrupt, if he has gone into bankruptcy proceedings, and is a bankrupt, and is receiving income, whether from a spendthrift trust, or from work, if it is very substantial income there is provision in here whereby a caveat can be filed, his bankrupt status is continued, and he must give up part of that income to the estate for distribution to his creditors. As I say, we did not focus on the institutions, either under the common law or under Quebec law, but there are other techniques here for getting at a person who is trying to circumvent the system.

The Chairman: Did I understand you to say that the debtor or person who is in financial difficulties may choose to proceed under the provincial legislation, and that he is immune to the provisions of the Bankruptcy Act?

Mr. Howard: He will not take any proceeding at all. He will ignore the Bankruptcy Act completely, and he will continue, say in Alberta, with his business or farm operation or whatever it is, and although ther is $16,000 in judgments outstanding against him, if he has his assets in the right kind of property, that is, in the kind of property that is immune from attack by a judgment creditor under Alberta law, then he is totally immune from process. That is what the exemptions are all about.

Senator Flynn: Not from a petition for bankruptcy.

Mr. Howard: No. But of course he would very carefully avoid petitioning in bankruptcy, because that means he would lose that immunity.

Senator Flynn: He cannot avoid petitioning if a creditor decides to make one.

Mr. David E. Baird, Adviser to the Committee: Would this not encourage the creditor to put him into bankruptcy because he would then lose the provincial exemption?

Mr. Howard: Yes, it would. This is one reason why it might be too low, but a person may be trying to use very generous provincial exemptions in order to avoid creditors, and, let us face it, in Canada today a very large number of creditors are from outside the province, or carry on business on a national scale, and do not look on that particular debtor as being uniquely a debtor in one province. This is probably the main reason why people have attacked our exemption as being too low, but even that exemption is considerably higher than the exemption under the execution acts in some of the provinces.

Senator Flynn: What about evaluation? There could be a debate on the $3,000, especially if it is in kind.

Mr. Howard: Yes. There is an evaluation in every case, of course, and that is the responsibility of the trustee.

The Chairman: Well, $3,000 today is not very much.

Senator Flynn: I know. It all depends on what you have in the way of assets. There could be quite a debate there, or uncertainty.

Mr. Howard: There are provisions, of course, here, for getting an evaluation, or even getting directions from the court, if it becomes a real problem.

Mr. Baird: The definition of property in section 2 of the act is very broad. It could cover income as well as physical or tangible assets such as Canada Pension payments, old age pension plans, disability payments, and so on, which are normally exempt under provincial law. Do you think those payments are covered within the $3,000 exemption? If a man wants to continue receiving his old age pension payments, would he lose the exemption?

Mr. Howard: Presumably he would not be exempt as it is defined right now.

Mr. Baird: So if he continues to receive old age pension payments those payments would be included in the $3,000 exemption.

Mr. Howard: Yes, but you are bringing up a very strange hypothetical case. If we had a person in those circumstances who went into bankruptcy—an honest bankupt—presumably he would not have the status of a bankrupt for more than 90 days, no caveat would be filed if there was no fraud or misrepresentation or attempt to defeat creditors, and at the end of the 90 days he would no longer be a bankrupt. The system was designed in that way so that we would not have to start juggling around a number of exemptions, and so on. What we have tried to do is get somebody through the system who really is an innocent debtor, who has been overwhelmed by his debts. We try to get him into the system, give him the status of bankrupt for 90 days so that we have the opportunity to investigate him and determine his status. If at the end of the 90 days we have not taken any positive action to continue his status as a bankrupt, then he is out. And, of course, there is no question of exemption after that period of time.

The Chairman: So, the 90-day period is very convenient; it is the kind of purifying flame that takes away all the stain of being a debtor and heavily involved.

Mr. Howard: Yes, that is the purpose of this provision, and that is the way it is intended to work.

The Chairman: Well, that is being very kind towards the debtor.

Senator Flynn: There would be no conditions imposed upon the debtor after 90 days even if he had some assets coming to him eventually?

Mr. Howard: You mean, if he has expectations because his father if rich?

Senator Flynn: No, but even if he is in receipt of an income.

Mr. Howard: If he is in receipt of an income and if the trustee or the bankruptcy administrator is of the opinion that he is simply trying to defeat his creditors.

Senator Flynn: No, I am not referring to that. You are speaking of the honest debtor.

Mr. Howard: Then, presumably, the honest debtor would be automatically discharged at the end of 90 days and released from his obligations.

Senator Flynn: No matter what his future possibilities might be of repaying his creditors?

Mr. Howard: They would be largely ignored, as they are largely ignored under the present system in most jurisdictions.

The Chairman: But the fact that they are ignored now is not the question. The question is this; what is a good system now?

Mr. Howard: And what is a good system for the future? This is what we are concerned with. We want a system that does not get us involved in a lot of very expensive administration of estates which may have some vague future expectations, or in respect of which the trustee—and I am sure Mr. Zwaig can enlighten us on this—is collecting very small amounts under a conditional discharge, and where it costs the trustee five times as much to keep the file open and administer the estate. That is a subtle kind of punishment of the debtor by not giving him an unconditional discharge. It costs us as administrators a lot of money and it costs the trustees a lot of administrative time.

Senator Flynn: Do you envisage the same treatment for a second bankruptcy?

Mr. Howard: No, this bill is relatively tough for anybody who wants to exploit the system a second time. There is no hard and fast rule to say that if you happen to become bankrupt a second time you will be thrown in jail.

Senator Flynn: But you can become bankrupt a second time without really being a thief. What happens then?

Mr. Howard: I realize that. One can be the victim of circumstances.

Senator Flynn: So what happens then?

Mr. Howard: Well, then the person is put under special scrutiny and may be subject to special sanctions.

Senator Flynn: Then the costs of administration start again.

Senator Cook: I would not think that the cost of administration is very important. After all, if you collect the money from the creditors, then that is a good service. Even if a man gets sick and has to go to hospital it can cost a lot of money, but at any rate the stay in hospital will help to make him better. So if it is going to cost the federal people a lot of money to collect debts, I do not see that as being a disadvantage.

Mr. Howard: No, sir. What we are saying is that if we are going to collect debts this way, then let us collect them through an arrangement system where there is a heavy onus on the bankrupt to plan his affairs and to live up to an appropriate arrangement system as a technique of rehabilitation in itself, and not to look upon it as some kind of punishment system in the discharge process.

Senator Flynn: You think the $3,000 exemption would be an incentiv e to stay away from bankruptcy?

Mr. Melvin C. Zwaig, C.A., Adviser to the Committee: Mr. Howard, you are encouraging a system of arrangements by keeping the exemptions at $3,000, in order to discourage bankruptcy. Yet, by encouraging a system of arrangements you are deferring the realization by secured creditors. Do you think that that is fair to that segment of the economy?

Mr. Howard: If you look carefully—and I know you have—at the sections concerning the deferral of rights of secured creditors in consumer arrangements, not much is really deferred. If it is a recent grant of credit he can recover it. He has an option to opt out, but if he does opt out then he cannot go after the deficiency balance.

The Chairman: I am wondering why you have such a short period as 90 days.

Mr. Howard: It is considered to be a reasonable time for the trustee and the bankruptcy administrator to look into his affairs and to decide whether it was an honest bankruptcy or whether it was an attempt to exploit the system to defeat creditors.

The Chairman: It is really a question of whether in the 90 days you could determine the potential of this man. First of all, there is no reason why he should not pay his debts, is there?

Mr. Howard: No, and that is why the emphasis is on the arrangement.

The Chairman: And in a proper case you want to be able to give him the opportunity of being able to make a fresh start.

Mr. Howard: Yes, that is right.

The Chairman: But then there may be creditors, so should we not have one eye fastened on them and their position as against the future potential of this man to earn income? You cannot assume or, at least, you must not assume that he is going to be bankrupt again. Maybe he has learned something, and he may have a good potential for earning. But if he does, then under the system as you are talking about it, he keeps all that for himself.

Mr. Howard: He does, if he no longer has the status of a bankrupt.

Senator Flynn: So with the system he can get away with a lot of debts and start all over again without having to pay anything on his possibilities of earning a great deal of money.

Mr. Howard: Exactly as he does right now under a summary bankruptcy administration.

Senator Flynn: But a court may order him to pay a certain amount to his creditors even after he is discharged.

Mr. Howard: That is right. That is the conditional discharge order. So what we are trying to do, instead of trying to use that penal tactic, is to compel the debtor himself to opt for an arrangement that achieves exactly the same thing. We are saying, "If you don't want to opt for an

arrangement, then we are going to strip you pretty clean if you go for a bankruptcy instead," even though that will leave him clean after 90 days if there is nothing dishonest involved.

Senator Flynn: Except for $3,000.

Mr. Howard: That is right.

Senator Cook: Why is it penal now if the court makes a conditional order, whereas if he goes into an arrangement then it is not penal? I just cannot see that.

Mr. Howard: He characterizes it as a penalty to him because in most jurisdictions in summary bankruptcies they get a complete discharge. There are some jurisdictions where the converse is true and the standard is a conditional discharge. They try to make them pay a little in order to make them act responsibly towards their creditors. What we are trying to do is to institutionalize this from the very beginning—not from the end of the program—but from the very beginning and get him into an arrangement so that he acts responsibly there and is seen so to act in the preparation of the arrangement itself and not just have something imposed on him from the outside. We try to get him involved in the process himself as the scheme of rehabilitation.

The Chairman: Why are you so concerned about the feelings of the debtor?

Mr. Howard: I do not recall mentioning the feelings of the debts.

The Chairman: What you said amounted to that; in other words, you are going to put him in a good mood to accept this.

Mr. Howard: I am not talking about a good mood. The bill is tough. What we are saying is, "If you want to opt for a bankruptcy and get washed through this system, then we are going virtually to strip you of all your assets."

Senator Flynn: But if you have none?

Mr. Howard: If you have none, then it does not matter anyway.

Senator Flynn: But if you have an earning capacity?

Mr. Howard: Then you had better go into an arrangement.

Senator Flynn: If you have no assets, there will not be this incentive that you think exists in this limitation of immunity. After all, if I have no assets, then I might as well go into bankruptcy and after 90 days I am washed clean again.

Mr. Howard: But you are always taking the risk that a caveat will be filed on the grounds that you are attempting to defeat your creditors and your status as a bankrupt will continue, and at that point you are liable to pay of your income into the bankrupt estate for a period of up to five years and that can be a very considerable penalty.

Senator Flynn: If I am attempting to exploit the system, who has to prove that, and on what basis? For instance, if in my capacity I have a great deal of credit and absolutely no assets and go into bankruptcy, who is to say that I am exploiting the system?

Mr. Howard: Ultimately, the court.

Senator Flynn: Why?

Mr. Howard: If you have a very high income and high income potential, then the administrator will not see any reason to extend the bankruptcy, so you cannot lend or borrow on credit to carry on business.

Senator Flynn: Is there any obligation to pay anything to the creditors?

Mr. Howard: No, but if you have a high earning potential and are a bankrupt, the court can order that you pay part of that later acquired income into the estate.

Mr. Baird: The fact of the matter is that the decision as to whether the court will be involved is made by the administrator, the creditors having no legal say in the matter.

Mr. Howard: You are saying that the administrator has, to use an analogy, prosecutorial discretion in respect of the caveat, rather than the creditors having it.

Mr. Baird: That is true.

Mr. Howard: Are you implying that in some way the administrator will work altogether independently of the wishes and views of the creditors?

Mr. Baird: Yes: he works completely independently of the creditors; they have no legal say whatsoever in what the administrator does.

Mr. Howard: That is why I used the analogy of the prosecutorial discretion, and there is a certain penal element in this process. One of the difficulties is that the creditors may be acting out of sheer vindictiveness. Personally, I do not care if you wish to give an alternative right to creditors, but I would like to ask Mr. Landry to comment with respect to that. He and his colleagues went into great detail in this connection during the preparation of this report.

Senator Flynn: I would like to know whether it improves the present situation. I have some doubt that it does, except by reducing to $3,000 the immune assets, which does not apply at all in most cases.

Mr. Zwaig: What has been the experience of the office of the Superintendent of Bankruptcy in reviewing the statistics? How many bankrupts presently have walked away with substantial sums of assets in their possession after going through bankruptcy, even with the exemptions in the provinces of Alberta and Saskatchewan, which are substantially higher exemptions than the $3,000?

Mr. Raymond Landry, Superintendent of Bankruptcy, Department of Consumer and Corporate Affairs: It is very difficult to assess, Mr. Zwaig. I was just handed the Superintendent's report for 1973, and the figures for 1974 will be quite similar. The overall dividend paid into bankruptcy across Canada will be 9 per cent on the outstanding claims, which is a very low amount.

Senator Flynn: Well, it is surprisingly high, to my mind.

Mr. Landry: I must mention that it is a 2 per cent increase compared to 1972, which is practically a 30 per cent increase. However, in bankruptcies throughout Canada the dividend has been very low, for many reasons. One is because people do not have assets. In some bankruptcies the creditors are paid completely, 100 cents on the

dollar. However, in our experience we found that possibly the best mechanism would be to go through the mutual arrangement, because in the arrangements across Canada the percentage of debts paid to creditors is more than 23 per cent.

Senator Flynn: Do you mean under the present system?

Mr. Landry: Yes, it is 21.2 per cent that is actually paid out—not a projected payment, but actually paid out. So our assumption is that it is much better, whether it be a businessman, a large firm or a small firm, or even a consumer, to try to attract those people in an arrangement. One of the built-in safeguards contained in the bill now is low exemptions.

Senator Flynn: That is not at all convincing.

Mr. Landry: If you refer to section 200, which lists the standards that must be applied when the administrator is endeavouring to assess whether the conduct of the debtor is good or bad, you will note that paragraph (b) provides:

> any act done or omitted by the bankrupt with a view to defeating or delaying the creditors generally;

This is a standard which will have to be looked into and if there is any possibility that the debtor has attempted to abuse the credit or bankruptcy system he might come under a caveat which would put him under a five-year restriction. This would give the creditors the opportunity to apply to the court under section 147 to obtain part income or property for as long as five years, which is two years more than the three-year arrangement period.

Senator Flynn: But the Big problem under the present system is that the creditors generally lose interest.

Mr. Landry: That is right.

Senator Flynn: And I do not believe the system as proposed in your proposals would change it. I was interested in Mr. Howard's remarks with respect to the secured and preferred creditors, who take everything, leaving nothing for the unsecured creditors. One of the objectives of the act is to correct that situation by creating a new class of secured creditor, wage earners, up to $2,000 each. However, that is not creating interest in the unsecured creditors but creating a new class of secured creditors, is it not?

Mr. Howard: Yes; of course, senator, that is the effect of that and it comes off the top again.

Senator Flynn: That is right, so it will be worse for the real unsecured creditors, which is where the fault of the present system lies. It is because the unsecured creditors have no hope of really gaining anything worth while. The creation of a new class of secured creditors will leave the new unsecured creditors in a worse position than previously.

Mr. Howard: You say worse, but, of course, all those wage earners are now preferred creditors.

Senator Flynn: Yes, but you said you wanted to increase the unsecured creditors.

Mr. Howard: That is right, and we hope we have left something in the pot for them.

Senator Flynn: They will get even less, because the wage earners will be secured up to $2,000.

Mr. Howard: We will probably discuss the question of the wage earners later on. As you discussed in your own recent session, we can think of the possibility of some kind of insurance scheme as an alternative institution which would be more desirable and acceptable to all concerned. Obviously it would complement our general policy under the bill by removing the paradox which you have just mentioned.

Senator Hays: Do you have any history of bankruptcies in the state of California and the provinces of Alberta and Saskatchewan, where there are higher exemptions?

Mr. Howard: Do you mean, do we have statistics with respect to the comparative number of cases which arise in those jurisdictions?

Senator Hays: It would seem to me that with the higher exemptions less bankruptcies would take place. Is there any history which would indicate that the higher exemptions make creditors more conscious of the money they pay?

Mr. Howard: Not now, because under the U.S. act and the Canadian act the federal statutes incorporate by reference the exemptions granted under the provincial statutes. There is no correlation of the type you mention. For example, there is a tremendous number of consumer bankruptcies in the state of California and the assumption is that it is because of the very generous exemptions. I do not believe we have any data collected in Canada to enable us to come to such a clear conclusion.

Senator Hays: There are more bankruptcies in the state of California than in the state of New York?

Mr. Howard: Yes, which is a very ungenerous state. There is a tremendous contrast. This was discussed in an empirical study carried out by the Brookings Institute some time ago in the United States.

Senator Flynn: Returning to the question of the arrangements, what is the amount of debts that someone must have in order to be able to become bankrupt?

Mr. Landry: In a voluntary bankruptcy?

Senator Flynn: Yes.

Mr. Landry: There are no minimums under the bill.

Senator Flynn: At the present time it is $1,000.

Mr. Landry: Yes, and this is retained in the case of a voluntary petition.

Senator Flynn: That goes against your idea that you would be encouraging people to make an arrangement.

Mr. Landry: If they have nothing, I would imagine, senator—

Senator Flynn: Leave them as they are and eventually the situation will either correct itself or will not worsen. If it worsens, the provisions of the Bankruptcy Act will take effect.

Mr. Howard: Might I add a point? I will get into this as an administrative factor later. If, in fact, he has some assets or some income potential, if he has very small debts and is trying to force a creditor to get off his back by going through the bankruptcy system, we will not handle that for him. He will have to go to a private sector trustee and

he will have to pay a substantial fee to get through that system. That is another safeguard that is built into this bill.

Mr. Baird: I understood that the consumer-debtor, under the definition, was any debtor, notwithstanding the amount of his liabilities. It could be a wage earner with liabilities of $100,000. He would come within the scope of the consumer-debtor arrangement. The only limitation is that a business debtor has to have liabilities of less than $10,000.

Mr. Howard: That is correct. What inference do you draw from that?

Mr. Baird: You said you would refuse to act if a man had a large number of liabilities.

Mr. Howard: Continuing the exact policy that we have now, if he had some assets or real income that enabled him to pay a private sector trustee to handle his affairs, we would do our utmost to see that it is continued to be handled by a private sector trustee. We do not see why he should be getting a free lunch.

Mr. Baird: My understanding is that a trustee has no right to act in consumer-debtor arrangements; he has only the right to act in bankruptcies.

Mr. Howard: I am talking about bankruptcies. He will not have the right to act in arrangements. We do not need him in the arrangements. We have considered this. One of the difficulties lies in having outside individuals soliciting business. It is a very serious problem. On the bankruptcy side, so far as possible we will continue a policy that we have in force now, simply because it is a very useful constraint to ensure that people are not just going through bankruptcy. By having to pay a substantial fee in the private sector, it acts as a very useful constraint.

Mr. Baird: The act does not say specifically when the private trustee is entitled to act or when the administrator is entitled to act in respect of a voluntary bankruptcy. The act says specifically that the administrator has the right to appoint the trustee and, in addition, if no trustee is appointed the administrator acts as trustee. It sets out no guidelines as to when the administrator acts as trustee. It does not give any dollar values. There is nothing in the act which makes the distinction.

Mr. Howard: The real difficulty with the statute, as I have mentioned, is that bankruptcy is essentially an administrative statute. We have tried to put in the statute itself all of the detailed administrative routines. We now have a statute of 400 sections. In fact, in any other system, particularly the U.S. system, they keep the act relatively short and add these procedures in the form of regulations. They set out in the regulations the kind of detail you are talking about. Quite frankly we do not put that kind of detailed policy in the statutes, because we are not—and I underline this—building some kind of a job for private sector trustees. We do have a policy, as you know, of getting estates over to private sector trustees where there are assets in the estate or where the debtor has income out of which he can pay the private sector trustee. Although it has been, and continues to be, the policy of the government to spin off administration to private trustees, there is no question of building up institutions within the statutes which guarantee private trustees a living forever. In future that might not be the best way. I do not know. I am stating here that we intend to continue the present policy.

Mr. Baird: The present policy is generally working very well.

Mr. Howard: That is why we intend to continue it.

Mr. Baird: The present policy is not based on any law or regulation. It is based on a directive from the Superintendent of Bankruptcy as to when the federal trustee is entitled to act and when he must refuse to act. It is not made public by means of regulations. It is not in the act. This is a very important point, in my opinion. I think it should be specified, either in the act or in the regulations, when a public trustee or private trustee is entitled to act.

Mr. Howard: I agree with you, I do not mind that being done, or at least the setting up of some kind of standards to express clearly what our present policy is, as I have already articulated. Where someone has assets or income that enables him to go to a private sector trustee, we want him to go there, to ensure that he is not getting free laundering under the bankruptcy system at the cost of our department.

Mr. Baird: The taxpayer is paying every time the federal trustee is required to act. If a private trustee acts, that is probably being paid for from the debtor's assets.

Mr. Howard: It is paid for by the creditors.

Mr. Baird: Not in every case. It is paid by virtue of a guarantee put up by a third party.

Senator Flynn: The policy would be the same as for legal aid. You would provide a federal trustee when a private trustee cannot be provided.

Mr. Howard: That is a fair comparison.

Senator Laird: Mr. Chairman, this interesting discussion raises a very fundamental point, one that is certainly bothering me and, I am sure, some of my colleagues. We will accept, as a premise, that certain bankruptcy reforms must be made, whether or not your proposals this morning are desirable. Certainly some are. Why must we have an entirely new set-up, completely different from the existing legislation? In other words, why cannot these reforms be effected by a simple amendment or amendments to the existing legislation?

Mr. Howard: I tried to underline at the beginning that we have something like five statutes right now which relate to these problems. All of them are demonstrably archaic in many of their provisions. I mentioned the kind of problems we had with IOS, where we had great difficulty getting it under any statute at all, simply because the standards were unclear under the corporation law, bankruptcy law and the Winding-up Act. We finally succeeded, but it took a considerable amount of time. Quite frankly, we are trying to build a set of standards into all of these acts which will enable us to act in crisis situations. In addition, as I mentioned, there has been a complete change in the credit system itself. That is why all of the discussion, and necessarily so, is on the consumer-debtor. In addition—I will be getting to these points again in a moment—we have under the present act a statutory system of procedures that were designed for large commercial bankruptcies and arrangements. They do not apply to most of the cases we now have, as I will demonstrate in a moment. They engender great cost, both in respect of the work of the private sector trustees and public administration, in order to go through what are usually routine cases. We are trying to do as much as we can to clear up policies

and procedures under the present act. A good part of this act is to clear up a lot of the really bad procedures we now have and to substitute for total surveillance an exceptions system where we can spot troublesome cases and give them very special treatment, whether they be administered in the private or public sector.

Senator Laird: I will illustrate my concern. You will find the administrator mentioned in many places in the bill. You might call him the ubiquitous administrator; he is all over the place. Under this bill he will take over some of the functions of the courts, in whom, I must say, I have more confidence than in any potential administrator. Why must we therefore completely change the whole system with brand new legislation? Cannot we correct what you are worried about by amending the existing legislation, leaving the foundation which now exists and add to it in a proper fashion to effect these reforms?

Mr. Howard: In effect, that is what we have done. I will give you a copy of the concordance. I think you will be suprised to note how many of the sections are identical to or a slight variation of what we have in the present act. In addition to that, we have added a special part on insurance companies, a special part on stockbrokers, and a special part on small debtors.

Senator Laird: I will go along with that to a certain extent, but let's be specific on the point I raised: Why must the administrator now assume functions which are being satisfactorily dealt with by the judicial officials, the registrars?

Mr. Howard: I should like to underline one point on the record now. This has been raised by Mr. Zwaig and, particularly, by Mr. Baird. If anyone can prove to us that it would be better, on balance, to leave administrative functions with the court registrars, we would be glad to do so, particularly with respect to non-adverse party actions or non-contentious applications, and so on. If it would be more convenient to creditors, their counsel, and everybody in the system, we would be glad to do so, but when it comes to the straight clerical routine of accepting petitions and entering them in the register, and so forth, we have already put that into the bankruptcy administration system. Previously, it was broadcast out to a hundred court registrars, none of whom were coordinated in any kind of system. That has now been changed. All of those basic ministerial functions have been taken away from the judicial system and have been put into a straight administration system. Of course, all we are saying is that employees in the court system who carried out those functions are now, in essence, in the regional offices, or local offices, of the Department of Consumer and Corporate Affairs, doing exactly the same thing.

Senator Connolly: But they are carrying out more than routine functions; they are exercising fairly broad discretion.

Mr. Howard: At times they are, yes. Some people, including Mr. Baird, feel we have made it very difficult; that by transferring the judicial powers to the court, the administrative powers to the administrators, we have left a hiatus that was previously filled by the registrars. if I have misstated Mr. Baird's view, he can correct me.

As I say, we are very amenable to any suggestion that will improve that pattern. However, as far as administrative tasks are concerned, we want them handled by the bankruptcy administrators.

The Chairman: Mr. Howard, if, as a result of the committee's study of the provisions in the present law and the provisions in the bill, it is determined that the balance of convenience is better served under the present law, then you would support an amendment to the bill?

Mr. Howard: Yes. As usual, Mr. Chairman, I had a very brief opening statement prepared, but somehow I never managed to get to the end of it. That is the conclusion of my opening statement.

Senator Connolly: Mr. Chairman, it seems to me that we had some evidence in an earlier meeting that as a result of these very sweeping changes a good many of the decisions that have been accumulated over the years will now be obsolete, and that perhaps most of the jurisprudence that has been built up will no longer be any guide, either to people who are affected by bankruptcies or to the professions that are involved in making the process work. Is that a fair statement, Mr. Howard?

Mr. Howard: To a large extent, yes. Of course, that is inherent in any reform of any law. We have done that with the income tax law and with corporation law, and we are in the process of doing it as far as the bankruptcy laws are concerned.

As I said earlier, a very large percentage of the provisions in this bill continue the policies of the present law. To a certain extent, this bill will modify the bankruptcy laws, with the result, we hope, of getting rid of a great many of the unnecessary subtleties that have been introduced by the jurisprudence, thus making it possible to express more clearly what the law and practice is in the system itself.

Obviously, we will get a great many comments, not only from this committee, but from various professional and business associations, to the effect that we have aggravated rather than alleviated certain conditions. We are not trying to replace what is useful jurisprudence, but there is no doubt that this bill will affect a lot of the existing jurisprudence.

I am afraid it is the lot of lawyers that for the rest of time they will no longer be able to talk about what the law was 20 years ago and base any decision on it. The legislatures in every jurisdiction—not just in Canada, but every jurisdiction—are actively changing existing laws—for example, recognizing that this system is largely an administrative system with very few simple substitute provisions in it. I mentioned particularly priorities. When you get away from that, you start to look at administrative procedures: for example, who is going to make the administrative decision who has the ultimate discretion, the administrator, the private trustee, or the court? That is what we are trying to clarify. If you look at it carefully, you will find that the bill is anything but permanent in terms of the law. There are a lot of changes.

Senator Laird: Of course, that has worried me and I know it has worried others.

Mr. Howard: And rightly so.

Senator Laird: You mentioned yourself the Income Tax Act. Believe me, subsequent events made me regret, even with the excellent changes which this committee made to that income tax bill, that I had voted for it.

Mr. Howard: Mr. Chairman, I would rather not comment on that. I feel I am getting between two houses.

The Chairman: Just remember, you introduced the subject.

Mr. Zwaig: Mr. Howard, supplemental to the question on administration, with the advent or the introduction of the bankruptcy administrator, what do you envisage will be the increase in the staff of the Superintendent of Bankruptcy for purposes of administering the new act?

Mr. Howard: Mr. Chairman, may I get into the actual tabulations that have been distributed so that I can answer with a greater degree of specificity? If possible, I would like to have these tabulations reproduced in the record of the committee's proceedings, so that members of the committee and others will be able to have reference to them.

The Chairman: Very well.

Table 3

TYPE OF BANKRUPTCY FROM
1 JANUARY 1974 TO
31 DECEMBER 1974
BY REGION

	Ordinary	Summary	Proposal	Total	Poor Debtor	Grand Total
Halifax	48	15	4	67	184	251
Quebec	930	1,269	145	2,344	615	2,959
Ontario	650	2,632	40	3,322	1,039	4,361
Prairie	179	730	8	917	418	1,335
Pacific	144	585	22	751	357	1,108
Total	1,951	5,231	219	7,401	2,613	10,014

Table 4

BANKRUPTCY RESOURCE DEPLOYMENT
AUTHORIZED BY MAIN ESTIMATES (1975-76)

Responsibility Centres	Admin-istration	Small Debtor	SUB ACTIVITIES Detection and Investigation	Private Admin-istration	Total Man Years
HQ Bankruptcy Branch					
Superintendent	4				4
Asst. Sup. Private Adm.				17	17
Asst. Sup. Federal Adm.		6			6
Asst. Sup. Det. and Inv.			5		5
Chief of Administration	23				23
TOTAL BRANCH	27	6	5	17	55
Field Operations Atlantic Region	2	6		2	10
Quebec Region					
Regional Office	2	1	2	5	10
Montreal		12	12	10	34
Quebec		5		5	10
Sherbrooke		3		3	6
TOTAL QUEBEC	2	21	14	23	60
Ontario Region					
Regional Office	2	2	3	5	12
Toronto		10	8	5	23
Ottawa		7		3	10
Hamilton		7		4	11
Sudbury		3		2	5
London		3		3	6
TOTAL ONTARIO	2	32	11	22	67
Prairie Region					
Regional Office	2				2
Winnipeg		4		2	6
Regina		4		2	6
Edmonton		4		2	6
Calgary		4		2	6
TOTAL PRAIRIES	2	16		8	26
Pacific Region	2	6	2	4	14
Total Field	10	81	28	59	178
Sub-Total Activity	37	87	33	77	232

Table 1

COMPARISON OF BANKRUPTCY STAFF AND WORKLOAD

Year	Staff: Head Office	Staff: Regional	Staff: Total	Reasons for Growth	Bankruptcies and Proposals	Year
1966	32	37	69	—Reaction to a number of bankruptcy scandals and the take-over of Official Receiver functions by the federal government. Table 2 provides a breakdown of the Official Receiver positions as of 1967 that were taken over.	4,963	1966
1967	64	43	107		4,276	1967
1968	64	43	107		4,099	1968
1969	61	52	113		4,345	1969
1970	48	65	113		5,974	1970
1971	55	81	136	—In June 1972 the small debtor program started. The growth after 1971 reflects the workload of the small debtor program.	6,427	1971
1972	67	130	197		6,956	1972
1973	56	178	234		9,458	1973
1974	56	178	234		10,014	1974
1975	55	177	232		12,000(1)	1975

(1) Projection based on 7,917 bankruptcies from 1 January to 31 August 1975.

Table 2

OFFICIAL RECEIVERS IN BANKRUPTCY
BY PROVINCES IN 1967

The federal government took over the function of the Official Receivers from the provinces and territories in July 1968.

The total number of Official Receivers in Canada in 1967, was 62, distributed as follows:

PROVINCES AND TERRITORIES	NUMBER OF INCUMBENTS	
Newfoundland	1	* 1
P.E.I.	1	* 1
Nova Scotia	4	* 4
New Brunswick	4	* 1
Québec	22	*11
Ontario	16	* 1
Manitoba	1	* 1
Saskatchewan	3	* 1
Alberta	2	* 2
British Columbia	6	* 5
Yukon Territory	1	* 1
Northwest Territories	1	* 1
TOTAL	62	*30

* Indicates that some of the incumbents have dual capacity and responsibility as Official Receivers and Registrars in Bankruptcy.

Mr. Howard: Table 1 shows a comparison of the actual bankruptcy branch staffs and the related workload. The centre column outlines the reasons for growth. Of course, between 1966 and 1970 there was considerable growth because, as I mentioned earlier, the administration of the bankruptcy law was carried out by a number of court registrars who had very little connection with one another and whose activities were only loosely coordinated by the Superintendent.

During the period from 1966 to 1972 there was a gradual takeover of the administrative functions from the court officers, who were public servants, to other public servants who specialized in bankruptcies and nothing but bankruptcies. That has worked out quite well from our point of view because we now have much better information on a weekly basis about what is going on within the system. We have policies and procedural manuals which enable us better to direct and coordinate the activities of all those people with a view to achieving more uniformity of practice across Canada.

Incidentally, I should mention that the growth from 1966 to 1972, in terms of the number of persons added, corresponds roughly to the number of persons who had been carrying out these functions in the court system. So, there was no aggregate growth. In other words, that netted out.

From 1972 on, with the introduction of the small debtor program, the government decided that these consumer debtors had to have some kind of assistance under the Bankruptcy Act. The staff has grown, as you can see in Table 1, from 136 to 232.

You will also notice in the workload column, the right-hand column, headed "bankruptcies and Proposals", that since 1971 the caseload has doubled. As I will show later, a good part of this growth is attributable to summary bankruptcies being handled by the private sector—something, of course, we want to encourage.

The Chairman: You have not included the registrars in the figures on Table 1?

Mr. Howard: No. Table 1 focuses on the administrative functions, not on the quasi-judicial functions of the registrars.

The Chairman: If I assume in 1976 that you have administrators replacing the registrars, by what number would the total figures be increased?

Mr. Howard: You are sort of anticipating what I am coming to.

The Chairman: I usually try to do that.

Mr. Howard: I noticed that, Mr. Chairman.

I will point out many reasons, particularly, the present restraints being imposed by government on government administrators at the federal level. Our goal is to achieve this conversion with no growth in total number of man-years. Indeed, I have to assume as administrators that we will be able to go from the present law to the new law with no additional man-days.

Mr. Baird: That is impossible, sir.

Mr. Howard: May I finish here before you tell me what is impossible. I have done the detailed empirical analysis. I underline that I cannot be certain that I am going to be able to do all of this.

Let me finish by going through the tabulation. I do not mind the criticism, but do not jump in to tell me what is impossible.

The Chairman: You have not answered my question on item 1.

Mr. Howard: You are saying the registrars, I presume, are going to continue to carry out many of the functions they are carrying out now. They are not carrying out, really, an administrative function with respect to the actual receipt of assignments. Under the bill, with respect to involuntary provisions, that does not go near a registrar or anyone else. That is essentially a ministerial function. That is right now a matter of judicial formality.

What we are trying to do is reduce the amount of empty formalism that people go through in this process, at great cost to the government, and as Mr. Baird pointed out, to the taxpayers.

The Chairman: Mr. Howard, I have listened to all that. Could we get back to my question?

Mr. Howard: Your question is about the registrar?

The Chairman: No. My question was: If you assume in 1976 that the registrar, if he continues to function at all, will have a very minor role, and the administrator's role becomes much more important, under the bill.

Mr. Howard: Not substantially. The administrator's role will continue to be exactly the role of the officers we now have in the regional and local offices of the Bankruptcy Branch.

The Chairman: You are not paying attention to my question. I said, if you assume that the administrator will have a larger responsibility under the bill—

Mr. Howard: Yes.

The Chairman: Therefore, you have to add to the administrators. I want to know, for this role of administrator, how many are you going to have to add?

Mr. Howard: My assumption is that I have to proceed with exactly the number of people I have now. Mr. Baird states that that is impossible.

The Chairman: I think it is impossible too.

Mr. Howard: That means I have to consider what other alternatives are available to us, to spin off work to the private sector and, as Mr. Baird and Mr. Zwaig mentioned, to keep it in the hands of the registrar, particularly, where

it has a quasi-judicial character; simply because I am not going to have the resources in the program in order to handle this. This is why I sort of cut off Mr. Baird. Quite frankly, I think we are coming to the same thing anyway.

I agree it is probably impossible unless we work out some other strategies for dealing with these things.

If you go to table 3, that is just a simple summary to give you an idea of the breakdown, region by region across Canada, of the volume of cases.

The Chairman: It is all right to go to table 3, if this is the way you want to present it, but I presume at some time before we are through I may get an answer to my question.

Mr. Howard: I would appreciate it, Mr. Chairman, if you would restate your question. One thing I never try to be is evasive.

I have stated that the government has told me, as they told me in connection with new corporation law, "You are not getting more resources." I have to infer from that decision, if we get a new bankruptcy law we are going to be told, "You are not going to get more resources." Now, they might change their minds at that time. In fact, it might be possible to demonstrate that it is just impossible to administer this.

The Chairman: Well, that takes it far enough for me. We then apply our judgment to the situation and decide whether we should approve a change in the sytem, which lessens the responsibility and the job of the registrar, or whether we should continue that setup. We make that decision.

Mr. Howard: As I pointed out, Mr. Chairman, we are very sympathetic to the idea of keeping in the hands of the registrar anything that is of a quasi-judicial nature—that is a very loose phrase, I realize—as distinct from a purely administrative or ministerial function. We are very sympathetic to that because they can be time-consuming tasks.

We know Mr. Baird and Mr. Zwaig made a listing of these various tasks. We will review that with you to see what can be done about that. Anything that can build in adminitrative efficiency, we are very receptive to. As I say, not only because that is our own personal goal, but also because government is putting us under such great pressure to make sure we do not need more man-years which, as you know, become permanent overhead because of the tenure of the employees.

I would like to underline, Mr. Chairman, that we all have the same goal in mind. I want to make clear that we have done a lot of thinking about it.

Now, over on table 4, this too demonstrates the total number of resources we have now and how they are spread out around the country. As you see, there are 55 now in headquarters and 178 out in the various field offices.

As I say, the ones out in the field offices handle essentially the ministerial duties that were carried out by court registrars and, more commonly, by court clerks.

Senator Connolly: That includes the court registrar, does it?

Mr. Howard: No, the court registrars are not included in this at all.

Senator Connolly: How many of them are there? Is there a figure?

Mr. Baird: No, they are not. You have to define your terms. In Ontario there is one court registrar for the entire province. In Quebec, there are a number of court registrars but in other provinces, I believe, there is one. There is one in British Columbia. There might be two in Alberta, I am not sure. I would think the number, except for the province of Quebec, would be approximately one for each province.

Mr. Howard: Mr. Baird, to particularize what you are saying, there are only a certain number of registrars in Cananda who are dedicated to bankruptcy work.

Mr. Baird: Who actually hear bankruptcy matters as registrars in bankruptcy, as opposed to court registrars for the normal civil process.

Mr. Howard: What you are saying then is these are non-adverse party proceedings, essentially, that are heard by a registrar or a master and do not go into a judge in chambers or into court.

Mr. Baird: I am saying a registrar in bankruptcy has a specific function, as opposed to the registrar in normal civil proceedings, and that there is one registrar in bankruptcy who hears bankruptcy matters in Ontario. Although there are registrars of the supreme court in every county of Ontario, they do not hear any bankruptcy matters; only one registrar in Ontario hears bankruptcy matters.

Senator Connolly: Does not the local master perform certain functions in connection with bankruptcy?

Mr. Baird: N~, he does not, unless there has been a specific trial of an issued directed to him by the bankruptcy judge. That is the only time that he hears bankruptcy matters.

Senator Connolly: Maybe I have not had anything to do with it for so long that it has all changed but as I understood it, at one time, if in Ottawa you filed a petition in bankruptcy you dealt with the local registrar.

Mr. Baird: It used to be that Mr. Elliott, the local registrar in Ottawa, was also the official receiver. He received voluntary assignments. His appointment as official receiver has been terminated and now a representative of the federal government is acting as official receiver in Ottawa.

Senator Connolly: Does that apply to all the other counties in Ontario?

Mr. Baird: Yes.

Senator Connolly: I see. I am just out of date on procedure.

Senator Beaubien: You and me, both.

Mr. Baird: An involuntary petition is filed only with the registrar of bankruptcy in Toronto. He is the only person in Ontario who makes orders and discharges bankruptcies which are unopposed, and if they are opposed it goes to the bankruptcy court judge.

Mr. Zwaig: Who is located in Toronto.

Mr. Howard: Are you finished, Mr. Baird?

Mr. Baird: Yes.

Mr. Howard: In fact, it leads to two conclusions. One, there is a lot of centralization in the actual administration of the bankruptcy system. That is largely because a lot of specialization is required. It is administratively complicat-

ed. This has led to centralization. It also points out that there are not hundreds of people doing things. There are very few registrars who really focus on bankruptcy matters. As I have underlined already, we want to leave it with them, if, in fact, that is where the balance of convenience lies.

If the courts themselves or if, indeed, parliament here decides that a number of these quasi-judicial cases should be assigned to the registrars, we have no objection to this. We do not want even to imply that we somehow lack faith in this field. What we are trying to do is rationalize an administrative system.

Mr. Baird: Mr. Howard, I know I stated very bluntly that I thought it would be impossible to administer the new act without additional personnel. My major concern was with respect to the small debtor arrangement program. At the present time the majority of the small debtor bankruptcies are being handled by private trustees who are located in various towns and cities throughout Canada. The thrust of the new act is to, to quote your words, "strip a man clean if he wants to go into voluntary bankruptcy and, therefore, to force him into an arrangement program." These arrangement programs are administered solely by administrators. To me this would seem to involve a tremendous amount of new work for administrators, work which is not being handled by your department at the present time. It seems to me that it would also involve offices in new locations as opposed to the regional offices which are presently located in the very large centres throughout the country. How is the small debtor going to be serviced by your department if it does not establish branch offices in each county town?

Mr. Howard: I am glad you asked that question. It was just what I was trying to lead to here. As a result of all these pressures we know that we must delegate to the private sector, as I mentioned. That means the commercial bankruptcies as in the past and the consumer bankruptcies, particularly where they have some assets. Now, it is very difficult for us to make a decision about subsidizing no-asset estates to be administered in the private sector, because there is always the danger that certain people will then go out and solicit business. We are not sure if we really want people out soliciting business which is going to require us to pay more and more subsidies, because it is another form of endless growth that we do not want. That is, we have to consider it, but we do not bar it.

Senator Connolly: Who would be soliciting business?

Mr. Howard: Trustees, who would be handling all small debtor bankruptcies. There would be a built-in incentive there to do this if they knew the federal government was paying the bills. If they are not soliciting, we presume these people will somehow work their way out of the situation or try to get into an arrangement.

The Chairman: What is the justification for subsidizing?

Mr. Howard: It is simply that the government has decided something must be done to help the very low income consumer debtor. There are two ways to do it: either you hire a public servant to handle these estates or you delegate it to the private sector, as we do under the legal aid systems, and you pay private sector practitioners to handle them. We have considered that. There is a discussion on this in the original bankruptcy report of 1970, and of the problems associated with it. It is difficult to gainsay the desirability of the original objective, that is, to somehow help these poor consumer debtors out of their plight.

What we are trying to do is seek the lowest cost way to do it.

Senator Flynn: In Quebec the legal aid system is doubled in this way: you can either get a lawyer who is in the so-called and properly called private sector or you can get a lawyer who is hired on a permanent basis for that purpose.

Mr. Howard: As I point out here, the pressure is on us now not to increase our internal resources because they tend to become permanent overhead.

Senator Flynn: There is no doubt that once you start, it is difficult to determine where you will end.

Mr. Howard: Getting back to Mr. Baird's question, which is a simple one, that is what we are trying to delegate to the private sector. On the other hand, in the public sector, as far as possible we will try to delegate to the provinces the responsibility to handle consumer arrangements. Our difficulty at present is that every province in Canada takes a different position, and between two poles: some provinces insist that they just want to take it over. They do not even want to talk to us. They just want to take it over and run it. That is quite undesirable from our point of view in terms of our overall policy development and evaluation of the effectiveness of the policy. The other pole is that there are other provinces which just do not want to touch it.

The Chairman: If I may interrupt you here, talking about limitations on the purse strings so far as your department is concerned, I thought that the proposed anti-inflation legislation provided an exemption, in that, if pending legislation or new legislation required additional expenditures and staff, it was not the intention of the anti-inflation bill to interfere with that.

Mr. Howard: I think that is true, but the anti-inflation policy itself sets two or three very high priority policy issues, and we are not included in those. I think we should all face it: bankruptcy is a very technical area; it is something which will never have great political glamour, and something that therefore will probably never have high priority when it comes to seeking resources. Neither Mr. Landry nor I have any illusions about that. That is why the pressure is real.

The Chairman: Well, you can understand why we are asking these questions about how much more money will be needed.

Mr. Howard: They are good questions, and Mr. Baird has focused on what is the difficult issue, and it is why I hedged a little bit when you were cross-examining me, because he has raised the real question.

The Chairman: When I was "cross-examining" you? I thought I was asking you questions.

Mr. Howard: It felt like a cross-examination, Mr. Chairman.

Senator Flynn: It is just a feeling he has, Mr. Chairman.

Mr. Howard: As I say, the only time counsel ever makes an opening statement and feels he is being cross-examined is when he is before the Senate committee. But we welcome this and we enjoy it.

To return to the critical problem, when we try to forecast the kind of resources which will be needed under this bill, two or three things intervene that are variables totally outside of our control. That is, the overall state of the economy and the role the provinces will play with respect to administering the commercial arrangements. We will continue the same relationship with the consumer bankruptcies. If there are any assets or if there is income, we will push the debtor out to the private sector. If he has nothing, then we will take on the file. That is equally true of commercial estates. If no trustee wants to take it on, we will take it on simply to wind up the estate and get it out of the way. In the past we have had estates lingering seemingly forever simply because there were no resources in them to handle them.

The Chairman: On that very point, Mr. Howard, the use of provincial government persons to perform some of these functions in the area we are talking about, I had a communication from Mr. Harley, the Minister of Consumer Affairs in Alberta. He says that the administration of the program, talking about the orderly payment of debts, was discussed recently with Mr. Raymond Landry, the Superintendent of Bankruptcy, who indicated that he was prepared to designate certain provincial government employees as deputy bankruptcy administrators, if this was the desire of any province. And what Mr. Harley wants, so he says, is clearer delegation provisions, if that is going to occur.

Now, is the object of that to saddle the provincial governments with the administrative costs, by virtue of appointing their employees as deputy bankruptcy administrators?

Mr. Howard: Mr. Chairman, there is no question of saddling anybody with costs in this. To keep Part X, the orderly payment of debts part of the present Bankruptcy Act, in perspective, we should remember that it was put in there in response to a constitutional decision that held *ultra vires* an Alberta law concerning the orderly payment of debts.

The Chairman: Well, Alberta may have its own statute.

Mr. Howard: No, they actually operate under Part X of the Bankruptcy Act. They have their own administrative set-up which independently operates under the federal Bankruptcy Act. The change here, of course, is to get all of this under one law. We have made it clear to them that we would like to delegate out just as far as possible the powers to run these small debtor arrangements, as they have been doing in the past. Indeed, they welcomed having the more flexible machinery set out in the bill. They are worried about the delegation and conflicts, particularly where the Superintendent licenses a public servant in Alberta. We have pointed out to them that where such a conflict arises, we would be quite willing to have it independently arbitrated. For example, if the Superintendent is threatening to suspend the licence of a provincial officer because he just thinks the provincial officer has been making too many mistakes, then we have to get together with them and they have to do something about it, and if they disagree with the Superintendent's decision, then that is subject to arbitration.

I should point out that our minister and I have met with the Alberta minister and officials to discuss this problem of delegation. The point is that we will do all in our power to try to define this, because obviously it is in our interest to delegate this out to the provincial level. But we are not trying to saddle them with anything. Remember, they are the ones who want it.

The Chairman: My question is, who is going to pay these bankruptcy administrators?

Mr. Howard: From all of our projections to date we have been able to infer that, ignoring ordinary government overhead, the actual arrangement process will pay for itself file by file. That is to cover the number of man-hours of labour that we put into an arrangement. There will be a levy of from 5 to 10 per cent taken off the payment paid in under the arrangement to pay for the actual administrative costs.

I have to introduce another variable into this now. Not only do we have the ups and downs, the secular changes in the economy itself; we have to consider the role of the provinces, and whether it is going to be positive or hostile. I do not think it will be hostile, but it might be totally neutral, which will impose a greater administrative burden on us.

We also have to have up-and-running computerized file management systems to handle these arrangements, and that is another reason why we want everyone to work under the one law with essentially one administrative system.

For the arrangements we already have computerized systems set up that are quite versatile and relatively cheap to run. To put it in perspective for you, with these systems, if we have roughly 5,000 arrangements in one year, we have at least four input documents. That is 20,000 input documents that have to be keypunched, exactly as the reporter is keypunching to prepare a transcript. The computer, from that data, will have to generate 1.2 million documents such as notices, statements, dividend cheques, notices of default, and so on. It therefore involves a tremendous amount of paper work, and what I am trying to point out to Mr. Baird is that there is great pressure on us to try to live within the existing resources, and as a corollary, that means that we must render much more efficient what we are doing, particularly with respect to consumer bankruptcies, at present. We must, as far as possible—and we will do this under the present law, I should add, parenthetically,—stop treating small consumer bankruptcies as though they were great million dollar commercial cases. We must steamline our procedures, adopt all those steamlined procedures under the proposed new act, make sure the proposed new act does not impose useless, costly formalities on us, get a computerized file management system to handle the arrangements, and then we will be able to minimize our staff.

I would be not only bold, but foolhardy, to suggest that I am going to be able to do this within the existing resources; however, what I am quite willing to state on the record is that my target is to achieve this within the existing resources, using the strategies I have already mentioned.

The Chairman: But you expect that in the administration of these arrangements in the provinces, those assets that are the subject of the arrangements will bear the cost of administration?

Mr. Howard: Yes, there will be a levy taken off the payments actually made by the debtor for distribution among the creditors, and that levy is going to be high enough to pay for the actual administrative cost of the arrangement; that is, the interview, and so on.

The Chairman: In the province.

Mr. Howard: As usual, Mr. Chairman, that is a very sensitive question. We have to negotiate with the provinces, depending upon the amount of workload they assume, with regard to who gets how much of that levy; but we are quite willing to be generous with that.

The Chairman: You are being generous with the creditors' assets.

Mr. Howard: The creditors, I believe, without any exception, will endorse an arrangement system in which they have some real hope of recovery from a debtor and actually some hope of rehabilitation of him to make him a responsible debtor.

The Chairman: I am not questioning that; I want to get at what is going to be the federal expense, if any, in connection with these arrangements, or will enough money be generated in the administration of the arrangements in the provinces to pay the costs? By that I mean all the costs.

Mr. Howard: You have raised a qualification that is not necessary. You have said "in the province". Wherever these things are administered, whether through provincial officers or federal officers, the system has been designed so that each arrangement file pays its own costs, ignoring general government overhead costs; but with regard to the actual manpower and computer costs, and so on, that go into that particular file—and this is Mr. Baird's problem—if the provinces do not come into the system, either the federal government will have to decline to offer the service in those provinces, or offer a very limited service, or, if the federal government decides, say, to offer a service comparable to what is offered in the provinces where the provinces undertake it, we will probably have to have increased resources.

Senator Connolly: Do you contemplate a run-down of the establishment within the provinces to deal in this field, if the provinces agree to the federal suggestion that this act contains?

Perhaps I had better say that in some other way. I take it that at the present time the provinces have programs particularly with respect to small debtors and arrangements, and they have, I suppose, a fairly substantial administrative establishment to carry out that work. Are you now going to ask the provinces to run that down somewhat, or completely, and to have the federal system substituted for the provincial scheme?

Mr. Howard: What we are trying to do, and I state this in the bluntest terms, is exploit the staff they have, the resources they have, the experience they have, in order to run what is a demonstrably more coherent and more efficient system. There is no question of displacement. We do not want to displace.

Senator Connolly: Does that involve, then, an increase in the staff the provinces might have to employ to do this work?

Mr. Howard: That is a very difficult general question. In British Columbia and Alberta, no, I do not think so, because they have already very substantial staffs working under local laws and under Part X. It varies in all of the other provinces. In the big provinces, Quebec and Ontario, they have never adopted Part X of the present Bankruptcy Act. Thus Quebec does it under the Loi Lacombe, and Ontario does it under a rather ad hoc system, private sector counselling agencies, which in turn are partly subsidized.

Senator Connolly: If you are going to add to their responsibilities and their burden, and if they are going to have to increase staff, either you are going to have to increase the allocation of moneys for that purpose or you are going to have to offer them payments to have them comply with the new federal act.

Mr. Howard: Yes, sir. To induce them to come into this we would be very willing to give up a very substantial part of the levy on the arrangements to cover most if not all of their costs.

Senator Connolly: I will ask this further question, although there may not be an answer. Have you any global figures for the number of people involved in this work that are paid by the provinces?

Mr. Howard: I do not have this at my fingertips, of course, but we could obtain this on a province-by-province basis to give you some idea of the number of people involved in administering different schemes in different provinces.

Senator Connolly: You have a possible total of 232 people to do this work under the act. That is the figure you project, as I understand it.

Mr. Howard: No. These are the present resources under the present act; but I am saying that I think we can convert to the new act without any growth. My difficulty there is, as I say, that if some of the provinces, particularly the big ones, take a totally neutral attitude, it is possible that we will come under great pressure to undertake all these arrangements in those provinces.

Senator Flynn: That is your responsibility.

Mr. Howard: That is a government policy decision at that time.

Senator Connolly: Put it this way: At the present time, is the global figure for the provinces more than 232?

Mr. Howard: It would be considerably below that if you just focus on Part X of the present Bankruptcy Act, because the big provinces have not incorporated it at all. Now, if you add to that the number involved in the administration of the Loi Lacombe in Quebec—and we do not have the numbers here, though we can obtain these for you—it is still considerably below the total number in the bankruptcy system. You must remember, of course, that most of these people in the bankruptcy system are handling ministerial duties plus the small debtor bankruptcies. I am just trying to point out that the present bankruptcy officers are handling ministerial duties in respect of all bankruptcies and, of course, are handling small bankruptcies, and very few arrangements. But they are not really handling consumer arrangements or consumer debtor arrangements as contemplated by Part III of this bill.

The Chairman: Mr. Howard, let us assume that this bill becomes law in the form in which it is in relation to the arrangement provisions.

Senator Connolly: I am sorry, Mr. Chairman, we cannot hear you.

The Chairman: I said, let us assume that this bill becomes law particularly in regard to the arrangements,

and then, let us say, a debtor in Ontario wishes to take advantage of it. That means that the federal authority is the only one empowered under this bill to carry out such provisions.

Mr. Howard: At that point we have two alternatives left.

The Chairman: But what I said is correct, is it not?

Mr. Howard: Yes. One alternative is to hire more staff, or if we have a number of specialists in consumer bankruptcies in the private sector, then to consider getting them into the arrangement process. But, again, that complicates matters considerably for us from an administrative point of view. That has been considered already, but again we are most reluctant to do it because it atomizes again the administration of these things, but it may be the only way we can afford to provide local services. It means that there has to be a reasonably heavy levy taken off these arrangements to pay the fees of the private sector trustees.

The Chairman: It is pretty "iffy", isn't it?

Mr. Howard: I like to be definite about these things, but there are conditions in there and we have volumes of numerical projections on this, but they are predicated on assumptions that just cannot be quantified. But that is the nature of administering any system, as you know, Mr. Chairman.

Mr. Baird: May I ask one further question, Mr. Chairman, before Mr. Howard carries on? The basic thrust of the proposed new legislation is to encourage a man to make an arrangement as opposed to going bankrupt and getting released from his debts. Is that correct?

Mr. Howard: That is correct.

Mr. Baird: Have you done an analysis of present small debtor bankruptcies to ascertain whether or not most small debtors have the ability to make payments to their creditors?

Mr. Howard: The criteria under the present small debtor program and the conditions of entry are so low that it is a fairly safe assumption to say that very few of them would be able to make an arrangement.

Mr. Baird: My question was not really directed towards the ones being handled solely by your department at the present time but, rather, to all individual voluntary assignments. Have you done an analysis of their earnings as opposed to their expenses, to determine if there is in fact a surplus available for creditors? I will premise my question on the basis that in my experience 90 per cent of the bankrupts that I advise are unable to make any payments to their creditors and are even unable to meet current obligations because they have suffered from unemployment, ill health, or in some cases matrimonial problems. They desperately need a fresh start. Now my impression of this legislation is that they are going to be pushed into an attempt to make an arrangement which will fail and therefore cause further problems from their point of view in that it will delay their rehabilitation and in turn cause great administrative problems.

Mr. Howard: That certainly is not our intention. Perhaps what you are saying is that the $3,000 exemption is too low to be workable.

Mr. Baird: Yes.

Mr. Howard: We are not trying to detract from the present criteria applying to the case where somebody should go into bankruptcy as distinct from making an arrangement, and here we are leaving the bankruptcy alternative.

Mr. Baird: I am also concerned with that $3,000, and I am sorry if I keep harping on it, but to me that would include exempt earnings. If a man earns $1,000 a month for three months, then that would be included in his exemption and surely that is not the intention of the legislation.

Mr. Howard: That is something of a problem. There is something I should clarify before that. Mr. Prabhu has sent up a note to me here. Where I indicated that you are considering whether somebody should go into bankruptcy and whether he should be automatically discharged at the end of 90 days, his actual earnings or his potential future earnings are not material except to the extent that they are caught within one of the conditions in clause 200 where there are a number of guidelines dealing with what I would call immoral conduct or any kind of criminal conduct that would preclude a person from obtaining an automatic discharge—like squandering money, gambling or wagering and so on.

Senator Flynn: Surely the criterion should be that part of these earnings which normally could be seized under the provincial law or under the bankruptcy law should be calculated in this $3,000 and not all of the earnings or wages earned during the bankruptcy period.

Mr. Howard: But Mr. Baird's problem is that if those are considered in the $3,000 exemption—

Senator Flynn: Not all of them.

Mr. Howard: And that arises from the definition of property, doesn't it, Mr. Baird?

Mr. Baird: Yes.

Mr. Howard: This is how we got into it and I would agree with him that it renders $3,000 property exemption just so low that there is almost nothing there, because an ordinary construction labourer would have that.

Senator Flynn: It raises the problem of what should go into the pot.

Mr. Howard: That is right, and I think the criticism is well taken. But one thing we want to make clear is this; we want to build incentives in here.

Senator Flynn: Oh we are in agreement, but we are discussing the $3,000 exemption and how it should be calculated.

Senator Connolly: May I ask Mr. Baird at this point how he would cure this problem?

Mr. Baird: If we are going to have a total limit on exempt assets, then we have to specify which assets are included in that total. For example, do we only put furniture in the total? Do we include the tools of the trade? Do we include a portion of earnings in the total? Do we include insurance policies where the wife or the children are beneficiaries. At the present time cash surrender insurance policies, if the wife or child is a beneficiary, are exempt. Do we throw these all into the pot? I will take the example that I have used before, and maybe it is not a good one, but what about old age pension benefits? Are they

included in the total? I do not think that many of these items should be included.

Senator Flynn: But the problem is not solved. All of these questions have no answer in the law.

Mr. Zwaig: And as the bill is presently presented there is no answer either.

Mr. Landry: Mr. Chairman, if I may qualify the statement just made, I think that if you look at clause 145.(1) which deals with property vesting in the trustee, it says, "...all the property of the bankrupt at that date...". So that cannot include any future income, wages or benefits that may come out of the property of the bankrupt. It is frozen at the date of bankruptcy. With respect to the exempt property it says that the individual must make a decision either to keep all his exempt property and not get a release from his debts even if he were under provincial legislation. I think the sections under the provincial law have a different focus than those under the bankruptcy law because he is not forced under provincial law to take less than what is owed to him. Under the bankruptcy law he can be forced to take less and there is a difference there.

It does not include the items just mentioned by Mr. Zwaig and Mr. Baird, but I think the bill is now very clear in that respct.

Senator Flynn: If it is clear in that respect, then the $3,000 is even less an incentive, because you are inciting people to enter voluntary bankruptcy, because they get rid of everything in the future. They just have to give up what they presently have and that is the end of it. However, very few in such a situation have more than $3,000. Their earnings and their possibilities are their best assets.

Mr. Landry: Then if a caveat is filed against a debtor because he has been found to have been conducting himself in an unacceptable commercial manner—

Senator Flynn: That is only an exceptional case.

Mr. Landry: Yes, and I believe you will see under the present act property is being brought in very much in the case of creditors.

Senator Flynn: That is just to indicate that there is doubt as to the usefulness of your scheme. I doubt very much if the incentive you believe to be contained in the act is real.

Mr. Landry: It is included on the basis that it is an incentive.

Senator Flynn: You must draw the line somewhere, of course.

Mr. Baird: Section 147 specifically provides that:

> 147. (1) Where an individual while he has the status of bankrupt
>
> (*a*) earns an income at a rate in excess of five hundred dollars a month or such greater amount as may be prescribed, or
>
> (*b*) acquires property in excess of that necessary to maintain a reasonable standard of living,
>
> the court, upon application, may make an order vesting in the trustee the whole or a part of such income or such property.

Senator Laird: That applies to while he is a bankrupt?

Mr. Baird: Yes, but he could have the status of a bankrupt for at least three months.

Senator Laird: Some of my colleagues are concerned with respect to the after-acquired property.

Mr. Landry: That section deals with it.

Senator Flynn: Yes; it is another property, but this would not be taken into consideration for the figure of $3,000.

Mr. Baird: That is the question.

Mr. Zwaig: That is the question.

Mr. Landry: You can understand the difficulties we have. We understand from Mr. Baird that he is concerned that we are forcing too many into arrangements when they should be entering bankruptcy. Others feel that we are making it too easy for people to get through the bankruptcy system.

Senator Flynn: We are trying to strike a good balance.

Mr. Landry: There is not that much difference in the policy, anyway. It is a matter of striking a reasonable balance, yes, between the creditors on the one hand and the debtors on the other and probably rehabilitation of the debt.

The Chairman: Mr. Landry, it appears to me that under section 145 you deal with an arrangement. In the province of Alberta, for example, the provincial exemptions are very high. Let us assume that in some other provinces the provincial exemptions are much lower. Section 145 deals with property vesting in the trustee. Exception is made for those things that do not vest in the trustee, one of which is the personal property as outlined in section 145.(1)(b):

> (a) the real property of the bankrupt that is exempt from execution or seizure under the law of the province or jurisdiction in which it is situated;
>
> (b) the personal property of the bankrupt that is exempt from execution or seizure under the law of the province or jurisdiction in which the bankrupt was resident during the year immediately preceding the filing of the petition or the greatest part of that year;

So if a person is seeking an arrangement and he is resident in Alberta he will save a much more substantial portion of his assets from going into the pot as part of the arrangement. Is that not correct?

Mr. Landry: Well, Mr. Chairman, in the case of an arrangement the debtor is entitled to keep all his property, which is another incentive for him to make an arrangement. In the case of bankruptcy, which is different from an arrangement, he can keep only exempt property. Section 145 is qualified by section 150, which provides that where a bankrupt retains exempt property with a value in excess of $3,000 he is not released from his debts. He is entitled to become bankrupt, but does not obtain a release from his debts. The type of property which would become exempt or vested in a trustee could be stated in the Bankruptcy Act but, Canada being such a wide country some items in, for instance, New Brunswick would certainly be of no use in Toronto or Montreal. Therefore, rather than take this approach, which has been taken in other jurisdictions, such as Australia—and, I believe, the United States is contemplating specifying the items which may be exempt

from property—we decided to place a maximum on it and leave it in the hands of the provinces to specify what the debtor may retain. However, I would like to emphasize the fact that in the case of an arrangement the debtor keeps all his property, whether exempt or not, for the purposes of the arrangement.

The Chairman: There may be as many different exemption provisions as we have provinces.

Mr. Landry: That is correct.

Senator Flynn: Under an arrangement, yes.

I would like Mr. Howard to address himself to the situation obtaining in the province of Quebec, where there is probably misunderstanding as to the exact purport of the Loi Lacombe. After all, it concerns itself only with wages and that part of the wages which is subject to seizure in the province of Quebec. There is no charge at the end, and if a debtor has other property it can be seized by his creditors. So it is unlikely, I suggest to you, that the government of Quebec will do away with this law. However, it seems to me that the new system will probably incite debtors in Quebec to endeavour to make an arrangement, or enter voluntary bankruptcy. This means that when we return to the problem we were discussing earlier, the federal government will have the responsibility of providing services in Quebec to a larger extent than it presently does. In my opinion that is unavoidable. It is also unlikely that the Province of Quebec, or the Province of Ontario, would wish to assume the responsibility for the administration of this legislation which, after all, is entirely within the competence and responsibility of the federal government.

Mr. Howard: Yes; I cannot speak for those governments. As I said, in the province of Quebec considerable resources are now dedicated to the administration of the Loi Lacombe.

Senator Flynn: Yes, but those resources cannot be used for something entirely different.

Mr. Howard: There is nothing in here which is inconsistent with or abrogates that particular law and the protection it accords. It offers a totally different system to resolve exactly the same problem.

Senator Flynn: But the two cannot be combined.

Mr. Howard: No, I would never recommend combining the two. The Loi Lacombe has a very limited effect and a very limited effectiveness. It is, however, as you and I know as practitioners in law, a means of getting a debtor from our offices into government offices, but at least he manages to retain some of his income. That was the reason for its introduction.

Senator Flynn: You are not suggesting that the public in general in Quebec will have the option to use the Loi Lacombe or to use the bankruptcy after it is enacted?

Mr. Howard: As this is contemplated at the moment, the Quebec government can assume the responsibility to administer these arrangements, in a similar manner to that in which we endeavour to have other provinces do that, which would be completely consistent with what they are doing now. Also it would probably give debtors in Quebec far, far better relief and more flexible programs than are presently available to them under the Loi Lacombe.

Senator Flynn: Yes, that is what I suggested to you, but the two cannot go together.

Mr. Howard: But whether the authorities in Quebec will undertake that responsibility, I do not know and cannot accurately forecast.

Senator Flynn: I cannot see it.

Mr. Howard: Mr. Landry has had some discussion with the Quebec officials, but they are not in a position to commit Quebec government resources. I believe, on the whole, from the discussions we have had with the provincial officials, they are sympathetic to the idea and think it is the kind of relief that more debtors need, particularly the arrangements.

Mr. Baird: Mr. Howard, could we move along to the additional functions the administrator will be performing for commercial bankruptcies? For example, under the new act the administrator is charged with carrying out an investigation of the debtor when a commercial arrangement, or a proposal for a commercial arrangement, is filed. He is responsible for inquiring into the causes of bankruptcy and the conduct of the bankrupt in any commercial bankruptcy, including a corporate bankruptcy. He has the obligation of determining whether a caveat should be filed to oppose the discharge of a bankrupt. He has the right to oppose the application of a bankrupt to obtain a certificate of non-responsibility, which is the new word for order of discharge. He applies to the court for an order requesting that an agent of the bankrupt have imposed upon him the status of a bankrupt.

If these functions are to be performed competently, I should think it would require additional staff in your department. These are new functions which are not being performed by your staff at present.

Mr. Landry: Mr. Chairman, if I might reply, under the present act the functions of the official receivers are being performed by employees from the Department of Consumer and Corporate Affairs. Bankrupts are being examined, and there is a statutory duty imposed on the official receiver to perform that duty. He chairs the meeting of creditors, except in the case of proposal. There again, we sometimes have someone present, which is welcomed, I think, by many creditors and trustees. So we are performing duties. The main goal of performing those duties is to ensure that no one is abusing the bankruptcy process.

This is not being changed under the new bill. It is felt that there is protection for the public, that investigation into the affairs of a debtor, or examination of his conduct, must be performed, and is being performed, under the present act. Even in the case of proposal, even though we do not have specific responsibility under the present act, we do look at proposals where there are suggestions made by the trustee or some creditors that some wrongdoing, or suspicion of wrongdoing, has taken place. We ask our official receivers to provide a report. After the conclusion of the examination of the debtor, chairing the meeting of creditors and hearing the complaints that creditors put forward, we ask for a report on what we believe has been going on in this particular venture. If further investigation is recommended, we call in the RCMP to ensure that no one gets away with fraud. I am saying that under the present system we are not sitting back waiting for things to develop. We are trying to ensure that a thorough examination is made of the affairs of a bankrupt. That is continued under the present act.

The Chairman: I do not think that Mr. Baird is suggesting otherwise.

Mr. Howard: Specifically, what you are really focusing on, Mr. Baird, is resources?

Mr. Baird: Yes.

Mr. Howard: We now have a good part of our resources dedicated to what are really formal functions: official receivers' examinations where they are not required or where they should be very considerably abridged. When you are going through 10,000 files a year, that adds up to a lot of resources. We are trying to get rid of these formalities, to simplify them, so that those same people can devote their time to these other functions. I repeat, our aim is to try to convert to the new law with no increase in resources. I cannot control what the provinces will do in connection with arrangements.

The Chairman: Before we go along with your opening statement—

Mr. Howard: As a matter of fact, I think we have gone to the end of it and back to the beginning. I would like to mention that we have demonstrated, in connection with the corporations bill, that we are amenable to change. This is our whole strategy with this bill, to get out a bill, to have hearings, to get the private sector to give us their comments, so that we in turn can get back to the drafting table.

Senator Connolly: Is this bill being studied in the House of Commons?

Mr. Howard: Not yet.

Senator Flynn: It is before the House, but it is waiting—

Mr. Howard: The House is waiting to see what will be the comments from this committee. There are no projected sittings of the House of Commons committee during this session.

Senator Flynn: You do not expect the bill to be passed during the present session?

Mr. Howard: No. We expect the bill to die on the Order Paper, at which time we shall have a lot of comments, enabling us to go back to the government to recommend changes. That is the strategy on this bill. During the development of the corporations bill, we made several hundred changes in the process. We still have to make changes. We will be back here in a few months with some of them. There are certain areas where good points have been raised. We want to reconsider what we have done, particularly the functions of the registrar. It is to everyone's convenience that he have complete powers under this statute. Let us see what we can do.

The Chairman: You do understand, Mr. Howard, that it would appear that the important submissions which this committee will get—for instance from the Canadian Bar Association, the Toronto Board of Trade, the Institute of Chartered Accountants, the Canadian Bankers Association—are likely to come about the third week in November. You may be waiting for them, but we are also waiting for them. They may strengthen some of the points we have developed, or they may provide answers. We will keep working on the bill so long as it is before this committee.

Mr. Howard: Mr. Chairman, we appreciate that. It is a technical bill and it is very difficult to get it into the House. It is equally difficult to keep up the momentum. Anything you can do to keep up the impetus will enable all of us, after thorough discussion, to come up with a better bankruptcy bill.

Regarding a few of the other points, there has been much criticism of the procedure for the taxation of accounts by the bankruptcy administrator. The way the system now works, any bill from the trustee comes automatically to the superintendent's office. It is scrutinized and before it is taxed by a judicial officer it gets clearance through our office. We thought we were doing everyone a favour by taking out one step and providing final approval from the superintendent's office, so they would not have to go through any court formality. But people have criticized this as some kind of discretion being given to bureaucrats. Well, the court officers are bureaucrats too. This is an area where we thought we were doing someone a favour, but we have been criticized.

The Chairman: I am sure that if you mentioned in a court that you regarded the judicial officers as bureaucrats, it might create problems.

Mr. Howard: I would not refer to the judges as being bureaucrats.

Senator Connolly: Are interested parties entitled on the taxation to appear before the superintendent?

Mr. Howard: Yes. There is a revision procedure. Indeed there is even an appeal to the court itself.

The Chairman: There is a thought that occurs to me on the question of the superintendent's taxing the bill. I refer to the provisions of a related statute which is also administered by the same department—namely, the competition bill. I am thinking about regulated industries. We have had a lot to do with that and we have heard a good deal of evidence. The question is that in Ontario, for instance, a committee of judges fix the scale of fees in court matters. There is a taxing officer and there is a right of appeal from the taxing officer to the court. So you do have provincial regulations which could be described as protecting the public interest. We protect the Superintendent of Bankruptcy. He is the one who taxes the bill. Is the public interest protected there? Is there any detriment to the public having the superintendent tax the bill? I assume you are not a lawyer—or perhaps you are.

Mr. Landry: I am.

The Chairman: Even so, the question might develop as to the protection of the public interest. We have been having a lot of problems on this subject in conveying our understanding to the departmental officials.

Mr. Landry: The officials of our own department?

The Chairman: Your own department, yes.

Mr. Landry: There is a distinction in the bill. When a case is taken to court, the taxation is made by the court, by the officers of the court, as provided in the bill. The only thing the Superintendent has responsibility for under the bill is to tax accounts of a non-judicial nature, and there is a review procedure and notices are sent out to creditors, to the bankrupt, and to the people requesting the taxation. There is also a review procedure in the case of lawyers and accountants, and there is an appeal procedure to the court if they are not satisfied with the taxation.

There again, I should like to sum up by saying, as Mr. Howard said earlier, that we thought we were doing them a favour. If we are not, we certainly would not insist on it.

The Chairman: Perhaps you are. In any event, we have certainly prolonged the delivery of Mr. Howard's opening statement. He may have learned some of our views and we some of his. Perhaps this would be a good time to call it a day.

Senator Flynn: Mr. Chairman, will the departmental officials return for our further hearings, or have we finished with them?

The Chairman: Well, if we need Mr. Howard and his colleagues, I am sure they will be available.

Mr. Howard: I will certainly be available, Mr. Chairman, as will my associates. Mr. Landry, I might say, has dedicated several years of his life to this and knows the detailed provisions of this bill much better than I do.

The Chairman: I am not overlooking Mr. Landry.

Mr. Howard: We will be available at your convenience, Mr. Chairman.

The Chairman: The meeting will adjourn.

The committee adjourned.

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FIRST SESSION—THIRTIETH PARLIAMENT
1974-75

THE SENATE OF CANADA

PROCEEDINGS OF THE

STANDING SENATE COMMITTEE ON

BANKING, TRADE AND COMMERCE

The Honourable SALTER A. HAYDEN, *Chairman*

Issue No. 56

WEDNESDAY, NOVEMBER 5, 1975

Complete Proceedings on Bill S-29 intituled:

«An Act to enable The Eastern Canada Savings and Loan Company and Central & Nova Scotia Trust Company to amalgamate»

REPORT OF THE COMMITTEE

(Witnesses: See Minutes of Proceedings)

29637—1

THE STANDING SENATE COMMITTEE ON BANKING, TRADE AND COMMERCE

The Honourable Salter A. Hayden, *Chairman*

The Honourable Senators:

Barrow	Hayden
Beaubien	Hays
Buckwold	Laird
Connolly (*Ottawa West*)	Lang
Cook	Macdonald (*Cape Breton*)
Desruisseaux	Macnaughton
Everett	McIlraith
*Flynn	Molson
Gélinas	*Perrault
Haig	Sullivan
	Walker—(19)

**Ex officio* members

(Quorum 5)

Order of Reference

Extract from the Minutes of the Proceedings of the Senate, October 28, 1975.

> "Pursuant to the Order of the Day, the Honourable Senator Barrow moved, seconded by the Honourable Senator Cottreau, that the Bill S-29, intituled: "An Act to enable The Eastern Canada Savings and Loan Company and Central & Nova Scotia Trust Company to amalgamate", be read the second time.
>
> After debate, and—
> The question being put on the motion, it was—
> Resolved in the affirmative.
>
> The Bill was then read the second time.
>
> The Honourable Senator Barrow moved, seconded by the Honourable Senator Cottreau, that the Bill be referred to the Standing Senate Committee on Banking, Trade and Commerce.
>
> The question being put on the motion, it was—
> Resolved in the affirmative."

Robert Fortier,
Clerk of the Senate.

Minutes of Proceedings

Wednesday, November 5, 1975
(72)

Pursuant to adjournment and notice the Standing Senate Committee on Banking, Trade & Commerce met this day at 9:30 a.m.

SUBJECT: *Bill S-29—"An Act to enable The Eastern Canada Savings and Loan Company and Central & Nova Scotia Trust Company to amalgamate".*

Present: The Honourable Senators Hayden (*Chairman*), Barrow, Beaubien, Buckwold, Connolly (*Ottawa West*), Cook, Desruisseaux, Flynn, Haig, Laird, Macdonald (*Cape Breton*), Macnaughton, McIlraith, Molson and Walker. (15)

Present, not of the Committee: The Honourable Senators Smith, (*Colchester*), and Lafond. (2)

In Attendance: Mr. R. L. duPlessis, Acting Assistant Law Clerk and Parliamentary Counsel.

WITNESSES:

The Eastern Canada Savings and Loan Company:

Mr. Harold P. Connor, Chairman of the Board;

Mr. Donald M. Smith, President; and

Mr. W. John MacInnes, Q.C., Counsel.

Central & Nova Scotia Trust Company:

Mr. Henry B. Rhude, Q.C., President; and

Mr. Donald R. Munro, Executive Vice-President.

Mr. John D. Richard, Parliamentary Agent.

Department of Insurance:

Mr. R. Humphrys, Superintendent.

Following discussion it was *Resolved* that certain amendments to the French text be adopted and then upon motion duly put, it was *Resolved* to report the said Bill as amended.

NOTE: (The full text of the above amendments appears by reference to the Report of the Committee immediately following these minutes)

At 10:15 a.m. the Committee proceeded to the next order of business.

ATTEST:

Frank A. Jackson,
Clerk of the Committee.

Report of the Committee

Wednesday, November 5, 1975

The Standing Senate Committee on Banking, Trade and Commerce to which was referred Bill S-29, intituled: "An Act to enable The Eastern Canada Savings and Loan Company and Central & Nova Scotia Trust Company to amalgamate", has, in obedience to the order of reference of Tuesday, October 28, 1975, examined the said Bill and now reports the same with the following amendments in the French text only:

1. *Page 1:* In the Preamble strike out the words "la Compagnie d'épargne et de prêt du Canada-Est et la" and substitute therefor the following:

   "la société The Eastern Canada Savings and Loan Company et la société"

2. *Page 2:* Strike out lines 13 and 14 and substitute therefor the following:

   "société The Eastern Canada Savings and Loan Company et"

3. *Page 2:* Strike out lines 34 and 35 and substitute therefor the following:

   "société The Eastern Canada Savings and Loan Company et la société Trust Central et Nouvelle-Écosse"

4. *Page 3:* Strike out lines 6 and 7 and substitute therefor the following:

   "société The Eastern Canada Savings and Loan Company était une compagnie fiduciaire au sens de"

5. *Page 3:* Strike out line 25 and substitute therefor the following:

   "société Trust Central et Nouvelle-Écosse avait reçu,"

6. *In the Title:* Strike out the words "la Compagnie d'épargne et de prêt du Canada-Est et la", and substitute therefor the following:

   "la société The Eastern Canada Savings and Loan Company et la société"

Respectfully submitted,

Salter A. Hayden,
Chairman.

The Standing Senate Committee on Banking, Trade and Commerce

Evidence

Ottawa, Wednesday, November 5, 1975.

The Standing Senate Committee on Banking, Trade and Commerce, to which was referred Bill S-29, to enable The Eastern Canada Savings and Loan Company and Central & Nova Scotia Trust Company to amalgamate, met this day at 9.30 a.m. to give consideration to the bill.

Senator Salter A. Hayden (*Chairman*) in the Chair.

The Chairman: Honourable senators, this morning we will deal first with a private bill, Bill S-29.

Bill S-29 was explained in the Senate by Senator Barrow. Have you anything to add, Senator Barrow?

Senator Barrow: No, Mr. Chairman, I have nothing to add.

The Chairman: Who are the witnesses for Bill S-29?

Senator Barrow: The witnesses we have here for Central & Nova Scotia Trust Company are Mr. Henry B. Rhude, Q.C., who is the president, and Mr. Donald R. Munro, who is the executive vice-president. For the Eastern Canada Savings and Loan Company, we have present this morning Mr. Harold P. Connor, chairman of the board, Mr. Donald M. Smith, president, and Mr. W. John MacInnes, Q.C., counsel. The parliamentary agent is Mr. John D. Richard.

The Chairman: I take it that Mr. Rhude will make the presentation for the trust company and that Mr. Connor will do so for the savings and loan company. Perhaps they could come forward. If you gentlemen wish to refer to any other witnesses you have here, you can just name them and they will stand.

As you know, the purpose of this bill is to amalgamate a loan company and a trust company. Gentlemen, who will give the opening statement?

Mr. Henry B. Rhude, Q.C., President, Central & Nova Scotia Trust Company: I will, Mr. Chairman. The statement I make will be on behalf of both companies.

Mr. Chairman, honourable senators, Eastern Canada Savings and Loan Company was incorporated in 1887 and has carried on business since that time. It is a loan company subject to the Loan Companies Act of Canada. It has its head office in Halifax, with 11 branches in various towns and cities throughout the Atlantic Provinces. On December 31, 1974, its assets were $368 million; its shareholders' equity $18 million.

Central & Nova Scotia Trust Company was formed on January 1, 1974, on the amalgamation of Central Trust Company of Canada and the Nova Scotia Trust Company. It is subject to the Trust Companies Act of Canada. Its head office is in Halifax; its executive offices are in Moncton. It has 23 branches, all in the Atlantic provinces. Its assets on December 31, 1974, were $378 million; its shareholders' equity was $19 million.

Discussions have taken place concerning the possible amalgamation of these two companies. The Loan Companies Act provides machinery for the amalgamation of two loan companies while the Trust Companies Act provides machinery for the amalgamation of two trust companies. There is no legislation which enables a loan company and a trust company to amalgamate.

Bill S-29 would permit the amalgamation of these two companies under the Trust Companies Act, and the new company would be a trust company under that act.

In June of this year the two companies sought and received the approval in principle of the Minister of Finance to their amalgamation. In September the shareholders of both companies authorized their directors to seek the necessary legislation.

The bill, if enacted, would permit the amalgamation. It is permissive only; it is not mandatory. The amalgamation will not become effective until certain steps are taken following the passage of the legislation. These include: the completion of an amalgamation agreement by the directors which conforms with the provisions of the Trust Companies Act; the ratification of that agreement by the shareholders; the recommendation of the Minister of Finance on the report of the Superintendent of Insurance; and the approval of the amalgamation agreement by the Governor in Council.

The new company so formed will be a trust company under the Trust Companies Act. Its rights, duties and obligations will be the same as any other trust company subject to the provisions of that act.

That is the statement I have to make, Mr. Chairman.

The Chairman: I have one rather pertinent question, Mr. Rhude: Why are you here seeking to amalgamate a loan company and a trust company?

Mr. Rhude: Mr. Chairman, perhaps Mr. Connor could speak to that.

We require legislation in order to take that step. Do you mean, why is it desirable from the point of view of the companies to amalgamate?

The Chairman: I want to know what the purpose is.

Mr. Rhude: Well, perhaps I could ask Mr. Connor if he could comment on that.

Mr. Harold P. Connor, Chairman of the Board, The Eastern Canada Savings and Loan Company: I would be glad to, Mr. Rhude.

Mr. Chairman and gentlemen, we feel that bringing together two companies such as these, with approximately

$400 million each by way of assets, will very greatly strengthen our financial base, make it possible for us more effectively to sell our GIRs to the public, make it possible for us more effectively to do an enlarged competitive mortgage business, and to provide better service to the public, not only in mortgages but also in the general trust business.

We feel that if we were to combine in this way we would be able to reduce our costs of operation. We feel that if we could keep our costs and our charges to the public down, we would strengthen our position as regards competing with other large national trust companies in Canada. I think we would be enabled to employ in and to attract to our organization a better quality of staff than we can as two separate companies of smaller size and strength. We would like to take a look at the possibility of expanding out of the Atlantic provinces, where we have now built a pretty strong base, and possibly become a national company. We do not feel we could do this with the assets that each of us has available now and in the light of the possible likely expansion of those separately over the next few years. This is an attraction.

In the case of The Eastern Canada, which is a loan company, we feel that while in recent years the enlargement of powers of a financial nature has largely been given to the trust companies and banks, the loan companies have been more or less restricted in their ability to provide additional services to the public. This has been a constraint upon us. To the extent, therefore, that The Eastern Savings and Loan Company is part of this concept, we feel that by becoming part of a trust company we will be able to have wide powers than otherwise.

The Chairman: I understand that the trust companies, with the enlargement of their powers, are competitors of yours in the field of lending, which is your prime business.

Mr. Connor: That is right.

The Chairman: And yet, as a loan company, you are under such restrictions as render you unable to compete with them in the other varieties of services that they offer.

Mr. Connor: That is exactly so, sir.

The Chairman: So what you want to do is put these two companies together as a trust company, which will give you an enlargement of your powers.

Mr. Connor: That is right.

The Chairman: Are there any questions?

Senator Molson: What powers would be lost in the joint venture that exist in the two separate entities today?

Mr. Connor: I cannot think of any powers at all that would be lost, sir.

Mr. Rhude: There is the power to issue debentures which the loan company now has, and which the new organization would not have under the Trust Companies Act, because a trust company cannot issue debentures. That is perhaps more a matter of form than of substance, because the trust company issues guaranteed investment certificates.

Senator Beaubien: Is there any market for the shares of The Eastern Canada Savings and Loan Company?

Mr. Connor: Yes, sir. They are listed on both the Toronto and Montreal exchanges, and they trade quite freely.

Senator Beaubien: And they are selling at what, roughly?

Mr. Connor: The last sales, I believe, were at $12\frac{1}{4}$, $12\frac{1}{2}$.

Senator Beaubien: What about the trust company?

Mr. Rhude: The trust company's shares are not listed on the stock exchanges; they do trade over the counter.

Senator Beaubien: What do they sell at, roughly?

Mr. Rhude: Approximately 14, $14\frac{1}{2}$ at the present time.

Senator Beaubien: What do you plan to do, then, if you amalgamate the two? Are you going to have an exchange of shares, or what?

Mr. Rhude: Yes, sir.

Senator Beaubien: Is that laid down in the bill?

Senator Walker: An exchange of shares on what basis? One of each?

Mr. Rhude: The exchange ratio has not been determined yet. We have not really talked about it, nor will we until the financial statements of the two companies are available at the end of the year.

Senator Walker: Could you tell me, with regard to the loan company, what particular gain there is for it in becoming amalgamated with the trust company? I know you will be able to issue guaranteed investment certificates but, just briefly, what are the other powers that you are going to get and that you do not have as a loan company?

Mr. Connor: Really, all that the loan company can do today is engage in the mortgage business. We are not permitted to do any agency business, such, for instance, as the real estate business, which a trust company can do. We, of course, cannot do trust business in itself. We are not permitted to issue these registered plans that have recently become available, and we have many, many restrictions. By becoming a trust company, of course, we will be enabled to provide all these other services to the public.

Senator Walker: Are you able to do banking at the present time, as a loan company?

Mr. Connor: Not as such, though we do take deposits.

Senator Walker: You will be getting a great deal, really, will you not, if you amalgamate?

Mr. Connor: Yes. We will be getting a great deal in the way of a broader facility to do business.

The Chairman: How would you compare the liquidity of the two companies?

Mr. Rhude: It will not adversely affect the liquidity of the two companies, and there will be no disappearance of assets at all, or of equity.

The Chairman: Is there any letter of intent to indicate the basis of the agreements which will be made, as and when you have done the things you are supposed to do?

Mr. Rhude: No, sir. We have had, however, some informal discussions. We thought that before we had serious

negotiations we should be in a position to carry them through, and that will not happen until we have the legislation.

The Chairman: I am just concerned as to whether we are going through the motions here in giving you the right to amalgamate and put the two companies together, or whether you have got to a stage where you have a pretty good idea as to what the terms are on which the exchange of shares will be made.

Senator Walker: It seems incredible that you would not have.

Mr. Rhude: Well, sir, we do not, and we have retained two firms of chartered accountants to make an evaluation of the shares. They are proceeding with that work now. They will not complete it—they have been asked not to complete it, as a matter of fact—until the financial statements of the two companies are available in early February, 1976. We will then receive a report, and while this will not be conclusive, it will, I am told, be a very important factor in determining the exchange ratios.

Senator Beaubien: How many shares of the loan company are outstanding in the hands of the public, and how many of the trust company are outstanding in the hands of the public?

Mr. Connor: The number of our shares is approximately 2,500,000. The exact figure is 2,537,920 for the loan company.

Mr. Rhude: There are 2,841,000 shares of the trust company outstanding.

Senator Laird: Under clause 2(2) there is provision for your entering into an amalgamation agreement. It is conceivable, of course, that if we pass this act, as is quite likely, the deal could still fall through if you cannot get mutually satisfactory terms.

Mr. Rhude: That is certainly the case, senator. I would like to mention that in the case of Central & Nova Scotia Trust Company, over 99 per cent of the shareholders who authorized the directors to seek this legislation were in favour of an amalgamation, and in the case of Eastern Canada Savings and Loan Company certainly over 90 per cent of the shareholders present at the meeting authorized the directors to seek this legislation. So from the shareholders' point of view there is obviously a great deal of support for the idea of amalgamation, and I think it is up to the directors to make sure that they can reach an agreement that will satisfy the shareholders.

Senator Laird: They agree in principle but, as Senator Beaubien has pointed out, there is no definite deal on the exchange of shares, and conceivably you could have trouble there.

Mr. Rhude: Yes, that is correct.

Senator Beaubien: Anyway the shareholders would have to agree to whatever arrangements were worked out in the end.

Mr. Rhude: That is correct, senator.

The Chairman: I understand that whether or not there is an agreement will depend on how the valuation figures appear to the shareholders.

Mr. Rhude: That is correct, senator.

The Chairman: You will have to go to the shareholders with the valuation and then they will have to approve that.

Mr. Rhude: Yes.

The Chairman: Will their approval be by simple majority?

Mr. Rhude: No, under the Trust Companies Act there must be a 75 per cent majority of those attending the meeting called for the purpose.

The Chairman: When you say "attend," you mean either in person or by proxy?

Mr. Rhude: Yes.

The Chairman: What would be the relationship between those attending the meeting in person and by proxy to the total outstanding number of shares?

Mr. Rhude: In the case of Central & Nova Scotia Trust over 80 per cent of the shareholders were present, and in the case of Eastern Canada Savings and Loan I think it was a little less.

Mr. Connor: We had 68 per cent of the total shares present, but I do not have a breakdown as between those who were present at the meeting and those who were absent.

Senator Molson: Mr. Chairman, are there any large holdings in either of these two companies—and by that I would have in mind a figure of 10 per cent or more—in any combination of non-arm's length groupings?

Mr. Rhude: In the case of Central & Nova Scotia Trust Company there are two shareholders each one of whom owns in excess of 10 per cent—considerably in excess.

Senator Molson: Are they related or in any way associated?

Mr. Rhude: They are associated in business, yes.

Senator Molson: What is their total holding?

Mr. Rhude: Their total holding would be approximately 67 per cent of Central & Nova Scotia Trust Company.

Senator Molson: And in the case of the loan company?

Mr. Connor: In the case of the loan company there are two shareholders who jointly have just about 30 per cent.

Senator Molson: They are the biggest ones?

Mr. Connor: Yes, they are.

Senator Molson: Are they the same, or have they any relationship with those of the trust company?

Mr. Connor: They are the same two.

Senator Molson: The same two?

Mr. Connor: The same two in both cases.

Senator Walker: Between them they would have what percentage at this time?

Mr. Connor: Approximately 30 per cent in the case of one company—

Mr. Rhude: And approximately 60 per cent of the loan company.

Senator Desruisseaux: How many shareholders does each company have?

Mr. Rhude: Central & Nova Scotia Trust Company has approximately 1,000, and Eastern Canada has approximately 2,300 shareholders.

Senator Walker: I can see now why you are so sure that you can work out a deal; it is a sort of mutual admiration society.

The Chairman: That helps, you know. Perhaps that is what makes the deal possible. What we have to determine here is whether or not it is in the public interest.

Are there any further questions?

There are certain amendments which our Acting Assistant Law Clerk has incorporated in a letter to me. He has indicated that, subject to these amendments, the bill, in his opinion, is in proper form and if enacted by Parliament would accomplish the purposes of the act as set out in the preamble. Now, as to those amendments, Mr. du Plessis, would you care to deal with them?

Mr. R. L. du Plessis, Acting Assistant Law Clerk and Parliamentary Counsel: With regard to the problem of the French name, the amendment is basically an amendment to the French name of Eastern Canada Savings and Loan Company as it appears in the act. This problem came to light just a few days ago, when it was discovered through a search of the statutes that the Eastern Canada Savings and Loan Company lost its French name in 1914 when the word "Limited" was dropped from the English name. I do not know if the company was aware at the time, but the French text of chapter 137 of the Statutes of Canada, 1914, which deleted the word "Limited" from the name of the company also changed the French name to read "Eastern Canada Savings and Loan Company". This might have been the intention of the company at the time or it might simply have been due to the fact that the translator did not want to take a chance with the translation of the English name. Whatever the reason, the company in 1914 acquired only one name, and that was Eastern Canada Savings and Loan Company. So we have to amend the bill to reflect that fact. That is the purpose of the amendment before you.

The Chairman: I understand that in a number of places in the bill it is proposed to strike out the name as it appears and use the French name. Is that right?

Mr. du Plessis: And use the English name.

The Chairman: Have you any objection to this, Mr. Rhude or Mr. Connor?

Mr. Rhude: No.

Mr. Connor: No.

Senator Beaubien: What will the continuing company be called?

Mr. Connor: We have not selected a name yet, senator. We have a list of about 100 names, but we have not got down to it yet. We will, of course, have to have it in both English and French.

The Chairman: This is just enabling legislation.

Senator Beaubien: Are you contemplating having the shares of the new company listed on any stock exchange?

Mr. Rhude: Yes, we are. They will be listed on the Montreal and Toronto Stock Exchanges, just as the Eastern Canada shares are now listed.

Senator Laird: And you will move into the other sections of Canada? You said that that was your ambition.

Mr. Rhude: Yes.

Senator Laird: You want to emulate the Bank of Nova Scotia?

Mr. Rhude: We would like the opportunity of providing the same high level of service that we now provide to other parts of Canada.

Senator Molson: Mr. Chairman, are we going to hear from Mr. Humphrys?

The Chairman: Yes.

Has either of you gentlemen anything further to add?

Mr. Rhude: No.

Mr. Connor: No.

The Chairman: Do any of the people you have with you have anything they want to add?

Mr. Rhude: No.

The Chairman: We have Mr. Humphrys here. I accused him earlier today, before this meeting started, of abandoning us because there was a time when he was before us so often that we thought of making him a member of the committee.

Senator Connolly: I hope not, Mr. Chairman. Then you would have deprived us of one of our best witnesses.

The Chairman: Mr. Humphrys, we are anxious to know what your views are in relation to what this bill proposes.

Mr. R. Humphrys, Superintendent of Insurance: Well, Mr. Chairman, the background has been well explained and I do not need to repeat that. Our principal preoccupation was to see to it that if any transaction such as this went ahead the interests of the depositors and the debenture holders of the mortgage loan company would be well protected and properly dealt with in the continuing company which would be a trust company. The bill before you would achieve that by requiring that the amalgamated companies—that is, the continuing company—would identify assets equal to the liabilities coming over from the mortgage loan company. These would be liabilities for outstanding debentures and deposits, and those assets would then be added to the guaranteed trust fund of the continuing company and become part of that fund. The debenture holders and depositors would then become the beneficiaries of the guaranteed trust fund in the same way as the holders of the guaranteed investment receipts and the depositors in the Central & Nova Scotia Trust Company.

In addition, the bill provides that the continuing company is deemed to have guaranteed the repayment of the deposits thus coming over from the loan company to the same extent as those deposits would have been guaranteed had they been accepted by the trust company in the first instance as guaranteed trust moneys. Thus we are satisfied that the interests of the debenture holders and

the depositors in the loan company are well protected if this amalgamation goes through, and their position would, in my opinion, be slightly enhanced as compared with their present position. That was our main concern, Mr. Chairman, and we believe the bill accomplishes that.

I should add that, as has already been mentioned, this is enabling legislation. If Parliament passes it, then the two companies must enter into an agreement. They must put this agreement before shareholders' meetings of each company separately. The agreement requires approval of 75 per cent of the shareholders present and voting, and they must represent at least 50 per cent of the outstanding shares. After that, they must apply to the Governor in Council for approval of the agreement. The Governor in Council cannot approve the agreement unless a number of conditions are met. The first is that the Minister of Finance, on report of the Superintendent, must recommend approval of the agreement. The second is that the Governor in Council must be satisfied that the agreement has been approved by these two shareholders' meetings. When the Governor in Council approves the agreement, if it does so, that brings the agreement into effect and causes the amalgamation to come into existence. Thus there is a good deal of protection along the way to make sure that the interests of all the parties are well exposed and well protected before the amalgamation can finally be carried through.

Senator Laird: Does that include shareholders?

Mr. Humphrys: Yes, senator; the shareholders in each company separately have to give their approval to the agreement.

Senator Laird: Yes, but you said that your principal objective was to protect debenture holders and depositors, and I did not hear you mention shareholders, which made me wonder if they do come within your concern and jurisdiction.

Mr. Humphrys: Well, I think the Superintendent, the Minister and the Governor in Council would probably look mainly at the position of the depositors. They would think in principle that the shareholders are able to look after themselves but, if there were any substantial and serious objections to the agreement on the part of shareholders, I think that these would certainly be taken into account along the way.

Senator Connolly: What is the ultimate legal entity that will emerge from this? Both of these companies will disappear.

Mr. Humphrys: That is correct, senator.

Senator Connolly: And a new company which results from the merger will then be the sole legal entity.

Mr. Humphrys: That is right; it will be a trust company and this bill and the agreement will deem it to be a company incorporated by special Act of Parliament, and thus it will be exactly the same as any other trust company subject to the Trust Companies Act.

Senator Connolly: What steps will have to be taken to bring that new company into existence? Will they have to obtain letters patent?

Mr. Humphrys: No; the amalgamation agreement, as approved by the Governor in Council, will be the legal document that effects amalgamation. This bill makes relevant provisions of the Trust Companies Act applicable to this agreement. Those provisions provide that when an amalgamation agreement is approved by the Governor in Council it will have the force of law. Thus that effects the legal merger of the two companies and creates the new continuing company.

Senator Flynn: This agreement would become the letters patent of the new company, in practice.

Mr. Humphrys: It would become their charter, if you like, but not necessarily letters patent. That would be the incorporating document, because it would specify the capital of the new company, the starting shareholders and other details of that type.

Senator Connolly: And that would have the authority of an act of Parliament, if this bill were passed?

Mr. Humphrys: Yes, senator.

Senator Molson: Have you seen a pro forma balance sheet of the proposed amalgamation?

Mr. Humphrys: No, I have not seen a pro forma balance sheet. We are well acquainted with both companies, of course, because we have supervised their activities for many years.

Senator Walker: There are obvious advantages, of course, but in addition to that each of these companies is in a strong financial position; it is not like picking up a weak company and amalgamating it with another which is in very good shape.

Mr. Humphrys: That is correct, senator.

Senator Molson: Both have earned surplus of some substance, I take it?

Mr. Humphrys: Yes, they both have earned surpluses and they are both in a profit-making position, so there are no financial problems of that type.

The Chairman: Before we decide to approve the bill, Mr. Rhude and Mr. Connor, I take it that you are requesting these amendments which the Law Clerk has mentioned.

Mr. Rhude: We are, sir.

Mr. Connor: That is correct, sir.

The Chairman: Is there a motion?

Senator Molson: I would like to ask you a question, Mr. Chairman, if I may, first. We are now discussing a bill to amalgamate a loan company and a trust company. We have on the file a bill to convert a loan company into a bank. We are getting into what I feel is a new field, and I wonder if there is anything in the principle at this stage that we ought to consider or think about—that is, the principle of permitting the change of identity of these corporate structures. As far as I know, it is new—or perhaps I am wrong.

The Chairman: It is more than a change of identity; it is a substantial change in which they are putting together the assets and undertakings of the trust company and the loan company, the continuing company being a trust company.

Senator Molson: Yes; we have a parallel situation in the I.A.C. and the bank.

The Chairman: Yes. Officially I do not know very much about that bill, as it is not before us yet. It will be before us tomorrow.

Senator Molson: But it has had first reading, so we know it is there.

The Chairman: Yes, but the principle may or may not be the same; each case has to stand on its own ground.

Mr. Humphrys: A special point of interest in this proposal and the question that evidently has come up in Senator Molson's mind is, why is it that there is no legislation that would permit this type of amalgamation? In my opinion, the answer is that it has happened very rarely in the past. Going back into history, the mortgage loan companies had their main thrust in selling debentures and investing in residential mortgages. Trust companies, on the other hand, obtained their start really in a fiduciary activity, and it has only been during the past five years or so that there has been an enormous surge forward in the guaranteed trust funds of trust companies. They have now become a major factor in what I call the financial intermediary business. It may be somewhat startling to note that as recently as 1950, looking at federal trust companies, the guaranteed trust funds amounted to $93 million, compared with the company funds, that is the capital and surplus, of $28 million. So you can see that the guaranteed trust fund—that is, the intermediary business—was not all that important in trust companies in those days. The estate trust agency funds were many times that, of course, but now the 1974 figures for federal companies alone show that the guaranteed trust funds total $4 billion. So in 25 years they have grown from $93 million to $4 billion.

That has put the trust companies, in a very important way, into the financial intermediary business, accepting deposits, selling instruments to the public, and investing principally in residential mortgages.

To that extent, the roles of the mortgage loan company and the trust company have come closer and closer together in that important aspect of the business. That is really at the heart of this kind of proposal, that the two companies, in this aspect, are coming closer and closer together in their thrust, power and service to the public.

Senator Flynn: Is it the first time we have had this type of legislation before Parliament?

Mr. Humphrys: Yes. I think it is the first merger of a trust company and a mortgage loan company, in our experience. There may have been this type of merger or amalgamation among provincially incorporated companies.

Senator Flynn: I am aware of one occasion in Quebec.

Senator Molson: Mr. Chairman, it is interesting that in changing its role the loan company can lose no profitable functions and can gain some by changing into the other form of company. I find that quite interesting. I would have thought that perhaps there would have been some changes in the roles of the two components.

The Chairman: It enlarges the area within which they can operate.

Senator Molson: In other words, the loan companies do not have the same opportunities as do the trust companies today.

The Chairman: That is right.

Senator Molson: Perhaps they will tend, as in this case, to disappear.

The Chairman: Instead of continuing as competitors in the area in which a loan company can operate, they will merge their operations so that the benefits will come to both.

Senator Beaubien: It should help to reduce their overhead.

The Chairman: Yes.

Senator Cook: Like financial first cousins.

The Chairman: Are there any further questions? I take it, Mr. Humphrys, you have no objection to the bill.

Mr. Humphrys: No, Mr. Chairman.

The Chairman: There is no guarantee that the enabling legislation will be used. That is for the future to decide.

Mr. Humphrys: It depends on the two parties reaching an appropriate agreement, and the agreement being approved by the governmental authorities.

The Chairman: At the request of the petitioners, there are amendments which our law clerks suggest should be made to a number of clauses in the bill. They are: to the preamble, on page 1; page 2, clause 1(1); page 2, clause 2(1); page 3, clause 3; page 3, clause 3(2); and in the title.

All that is accomplished there, as I understand it from the law clerks, is to carry forward the proper title description of The Eastern Canada Savings and Loan Company. Is that right?

Mr. du Plessis: That is right, Mr. Chairman.

The Chairman: Do we have a motion that the bill be amended in that regard?

Senator McIlraith: I so move.

The Chairman: Shall I report the bill, as amended?

Hon. Senators: Agreed.

The Committee then proceeded to the next order of business.

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FIRST SESSION—THIRTIETH PARLIAMENT
1974-75

THE SENATE OF CANADA

PROCEEDINGS OF THE

STANDING SENATE COMMITTEE ON

BANKING, TRADE AND COMMERCE

The Honourable SALTER A. HAYDEN, *Chairman*

Issue No. 57

WEDNESDAY, NOVEMBER 5, 1975

First **Proceedings on Bill C-2,**
intituled:

"An Act to amend the Combines Investigation Act and The Bank Act and to repeal an Act to amend an Act to amend the Combines Investigation Act and the Criminal Code"

(Witnesses: See Minutes of Proceedings)

29639—1

THE STANDING SENATE COMMITTEE ON BANKING, TRADE AND COMMERCE

The Honourable Salter A. Hayden, *Chairman*

The Honourable Senators:

Barrow	Hays
Beaubien	Laird
Buckwold	Lang
Connolly (*OttawaWest*)	Macdonald (*Cape Breton*)
Cook	Macnaughton
Desruisseaux	McIlraith
Everett	Molson
*Flynn	*Perrault
Gélinas	Sullivan
Haig	Walker—(19)
Hayden	

**Ex officio* members

(Quorum 5)

Order of Reference

Extract from the Minutes of the Proceedings of the Senate, October 28, 1975.

"Pursuant to the Order of the Day, the Senate resumed the debate on the motion of the Honourable Senator Cook, seconded by the Honourable Senator Paterson, for the second reading of the Bill C-2, intituled: "An Act to amend the Combines Investigation Act and the Bank Act and to repeal an Act to amend an Act to amend the Combines Investigation Act and the Criminal Code".

After debate, and—
The question being put on the motion, it was—
Resolved in the affirmative.

The Bill was then read the second time.

The Honourable Senator Cook moved, seconded by the Honourable Senator Burchill, that the Bill be referred to the Standing Senate Committee on Banking, Trade and Commerce.

The question being put on the motion, it was—
Resolved in the affirmative."

Robert Fortier,
Clerk of the Senate.

29639—2

Minutes of Proceedings

Wednesday, November 5, 1975
(72)

Pursuant to adjournment and notice the Standing Senate Committee on Banking, Trade and Commerce met this day at 10:15 a.m.

SUBJECT: *Bill C-2—"An Act to amend the Combines Investigation Act and The Bank Act and to repeal an Act to amend an Act to amend the Combines Investigation Act and the Criminal Code".*

Present: The Honourable Senators Hayden (*Chairman*), Barrow, Beaubien, Buckwold, Connolly (*Ottawa West*), Cook, Desruisseaux, Flynn, Haig, Laird, Macdonald (*Cape Breton*), Macnaughton, McIlraith, Molson and Walker. (15)

Present, not of the Committee: The Honourable Senators Lafond and Smith (*Colchester*). (2)

In Attendance: Messrs. E. J. Cowling and J. F. Lewis, Advisors to the Committee.

WITNESSES:

Air Transport Association of Canada:

Mr. D. G. Blair, Counsel;
Mr. A. C. Morrison, President;
Mr. G. N. Pratt, Chairman, Legal Committee;
Mr. H. D. Cameron, Vice-President, International & Corporate Services, CP Air; and

Mr. C. I. Taylor, Vice-President, Public Affairs, Air Canada.

International Air Transport Association:

Dr. J. Thomka-Gazdik, Q.C., Ass't Director General and General Counsel.

Following discussion, it was *Agreed* that the Second Interim Report of the Committee dated June 26, 1975, be printed as Appendix "A" to these proceedings.

The Committee, together with the advisory staff and the witnesses, proceeded to discuss the above Bill and the amendments made thereto, prior to third reading.

At 12 noon, the Committee adjourned until later this day.

4:10 p.m.
(74)

At 4:10 p.m. the Committee met *in camera* to *resume* its consideration of the above Bill.

Present: The Honourable Senators Hayden (*Chairman*), Barrow, Connolly (*Ottawa West*), Desruisseaux, Laird, Macnaughton and Molson. (7)

Present, not of the Committee: The Honourable Senators Benidickson and Lawson. (2)

In Attendance: Messrs. E. J. Cowling and J. F. Lewis, Advisors to the Committee.

The Committee proceeded to consider the recommendations made in its two Interim Reports in comparison with the Bill as passed by the House of Commons.

At 5:00 p.m. the Committee adjourned until 9:30 a.m., Thursday, November 6, 1975.

ATTEST:

Frank A. Jackson,
Clerk of the Committee.

The Standing Senate Committee on Banking, Trade and Commerce

Evidence

Ottawa, Wednesday, November 5, 1975.

The Standing Senate Committee on Banking, Trade and Commerce, to which was referred Bill C-2, to amend the Combines Investigation Act and the Bank Act and to repeal an Act to amend an Act to amend the Combines Investigation Act and the Criminal Code, met this day at 10.30 a.m. to give consideration to the bill.

Senator Salter A. Hayden (Chairman) in the Chair.

The Chairman: Honourable senators, we now have before us Bill C-2. As honourable senators will recall, we dealt with the subject matter of this bill while the bill was in the House of Commons, and we heard many submissions. The bill is now officially, and in a formal way, before this committee following second reading in the Senate.

Today's hearing has some bearing on our second report, where we dealt with international air travel rates and proposed an amendment. That amendment was not incorporated in the bill by the House of Commons. Since that time, others have come forward to support the amendment, either as we approved it or with some changes to meet their situation.

I expect we shall have before us this morning Dr. J. Thomka-Gazdik, Q.C., who represents IATA, the International Air Transport Association. We have also with us representatives of the Air Transport Association of Canada, represented by Mr. D. G. Blair, who is counsel; Mr. H. D. Cameron, Vice-President, International & Corporate Services, CP Air; Mr. A. C. Morrison, President, Air Transport Association of Canada; Mr. G. N. Pratt, Chairman, Legal Committee, Air Transport Association of Canada; and Mr. C. I. Taylor, Vice-President, Public Affairs, Air Canada.

I have also heard from one other organization, but, as I understand it, they have not made any submission. I refer to an organization of air travel agencies which sell this service and make all travel arrangements. No doubt they deal with those companies with which they make travel arrangements.

I suggest that we should hear from Mr. Blair and the other representatives from the Air Transport Association of Canada, see what is their problem, and whether it is covered by our proposed amendment; and if not, what they do propose and why they propose it.

Senator Flynn: Mr. Chairman, before dealing with this problem, may I ask whether others have requested to appear before the committee in relation to other matters?

The Chairman: Yes. Perhaps I should not say "yes" so hurriedly. We have received a letter from counsel for the Canadian Tire Association, calling our attention to the inadequacy of the amendment dealing with their problem. Mr. Cowling can develop that later.

We have also received a letter from another law firm, whose previous representations dealing with exclusive dealing and price maintenance were made before the committee of the other place. Some suggestions are made in the letter and, as well, the writer states that if we desire any further information, or if we wish the law firm to submit anything further, it would be prepared to do so.

I think, first of all, we should decide whether that is an area we should go into now; and, secondly, whether we need any more assistance to deal with it, bearing in mind we do have expert help, not only in our expert advisers but also in the membership of this committee, all of whom have become experts on the subject.

Senator Laird: Mr. Chairman, following up Senator Flynn's question, we have one group before us today who are complaining because an amendment that this committee suggested, if I am not mistaken, was not adopted by the committee of the other place and incorporated in the new bill. Is that right?

The Chairman: Without making too many changes in what you have said, I think perhaps the way to put it is that this group feels its position is such that they should have a specific exemption, and the question is whether the amendment we proposed, which was prepared following our meeting with Dr. Thomka-Gazdik of IATA, goes far enough in covering their situation.

Senator Laird: Specifically, the amendment we suggested, as I understand it, was certainly not agreed to by the committee of the other place and, therefore, was not incorporated in the bill before us.

The Chairman: No. As a matter of fact, I cannot find any place where it was even discussed, although I understand that representations did go forward directly to the minister in connection with this point which we are dealing with, and also to four or five ministers of the government, and no action was taken.

Senator McIlraith: Were representations made to the committee of the other place on this point?

The Chairman: No, it did not get to the committee of the other place.

Senator McIlraith: So, the point was not dealt with in the other place at all.

The Chairman: That is right.

Mr. R. J. Cowling (Legal Adviser to the Committee): This whole problem was raised not too long before Parliament adjourned for the summer. I do not believe that the subject was discussed at all, either in committee of the other place or in the house itself.

The Chairman: So that it is understood, our staff—and I, myself, took part in some of the discussions—had discussions with the staff of the department. We discussed the various amendments which this committee had proposed and got the reactions of the departmental officials to them. In connection with this amendment, the indication from the departmental officials was that the jurisprudence, or the case law, was such that it should afford ample protection to these people. This committee discussed that very point when considering the amendment, and we were not of the same opinion.

In view of the discussions—without indicating the nature or extent of them—I did mention to the committee the expression which was used in one of the discussions by one of the officials of the department, that being that they hoped some day to "revisit" the breweries case. The question is how you interpret the word "revisit." I interpreted it as meaning that the department would like to have a go at whether the fixing of air travel rates was within or without the provisions of the Combines Investigation Act.

On that point, members of the committee will recall that there was a statute passed in 1970 called the Shipping Conferences Exemption Act, which provided a specific exemption for the Shipping Conferences in the fixing of rates.

It is interesting to note that in 1965 the Combines Director started an investigation into the conduct, behaviour and the actions of the Shipping Conference. He carried out a full investigation and made a report to the Restrictive Trade Practices Commission in which he claimed that the Shipping Conference was in violation of the criminal section provisions of the Combines Investigation Act—that is, there was a conspiracy among all the members of the Shipping Conference on rates, and, as such, that constituted a criminal offence.

There was a full scale hearing before the Restrictive Trade Practices Commission. During the course of that hearing the Shipping Conference members presented a great deal of evidence to show the value of the Conference and how the public interest was being served by having these conferences so as to take the chaos out of travel rates, cargo rates, and so forth, because the rates were unsettled, unstable. The decision of the Restrictive Trade Practices Commission was that while the Shipping Conference really carried on a cartel it was in the public interest and, as a result, the Shipping Conferences Exemption Act was passed in 1970.

I went to the trouble of reading the presentation by the then minister when he tabled the Shipping Conferences Exemption bill, as well as the ensuing debate, and the reason for the introduction of the exempting bill was to protect the public interest against any disturbance from the Combines Investigation people.

The bill in question was proclaimed in March 1971, and was to be in force for a period of three years. It then provided that unless there was a further proclamation the act would die.

As of March 31, 1974, and effective that date, there was another proclamation proclaiming the act be continued until 1979. Quite obviously, from the government's point of view, when it is wearing the glasses of the Shipping Conference, and the public interest as related to that, it has expressed what its intention is; that is, that the legislation in question is good legislation and should continue until 1979.

It is hard for me at the moment to adjust my thinking to say that the circumstances in connection with the Shipping Conference rates are not sufficiently parallel with the situation in air travel that similar legislation should not be enacted in respect of air travel. It is hard to distinguish the thinking in one case as against the thinking in the other case.

The only answer we could get in connection with our amendment was that the department, which includes the minister, did not want any more exemptions in Bill C-2. The only answer which I made was; "Well, as far as the committee of the Senate is concerned, it will decide whether there should or should not be such an amendment. If the committee decides that there should be such an amendment and the department does not want that exemption, then it becomes an issue."

Senator Flynn: Will the minister be appearing before the committee to explain his refusal, not only in connection with this amendment but other amendments and suggestions which were contained in this committee's interim report?

The Chairman: We dealt with this problem in the second interim report. You remember we had a special meeting and heard Dr. Thomka-Gazdik.

Senator Walker: who is the minister?

The Chairman: The minister at the present time is Mr. Ouellet. I have also had a message relayed to me that at some stage when we are considering how we shall deal with the bill in the form in which it came to us, and having regard to the amendments we have proposed which have not been incorporated in the bill, the minister would like to appear personally to explain the position of the department, so we must keep that in mind.

Now we will hear from Mr. Blair.

Mr. D. G. Blair Q.C., Counsel, Air Transport Association of Canada: Mr. Chairman, honourable senators, the presentation this morning will be made by Mr. Angus Morrison, President of the Air Transport Association of Canada, on behalf of all its members. The problem we are presenting to you would invite many questions about actual operating practices. Therefore, a special committee was created, including Mr. Scott Taylor, the Vice-President of Air Canada, and Mr. Cameron, Vice-President of C.P.R., to assist Mr. Morrison in the presentation.

Perhaps I could just offer a comment on where we stand in terms of procedure. The air transport industry felt that the better procedure when the matter was before the House of Commons was to ask the government to consider the advisability of removing the industry from the ambit of the new combines law on the ground that it was an industry which was already regulated. Discussions were held with the ministry, which involved other ministries, including the Department of Consumer and Corporate Affairs. At a quite late stage, in the spring it was decided that the government was not going to make that amendment, but I believe at that time it was almost too late to go to the Commons committee. That is why we are here today, to support fully the decision made with respect to Dr. Thomka-Gazdik's submission in June. I would now like to call on Mr. Morrison to make the presentation that has been distributed.

Senator Laird: Before that, Mr. Blair, would it be fair to ask, having in mind what you have just said, whether or

not in your representations you were turned down flatly on the suggested amendment?

Mr. Blair: I think it was something that was left for further consideration. I was not present at these discussions, but I think Senator Hayden has reported what I was told, which is that the government is anxious to go ahead with its bill and not complicate its passage by further exemptions in the House.

Senator Macnaughton: At the end of the session?

Mr. Blair: Yes.

Senator Connolly: In view of what Senator Hayden said about the 1970 legislation, which was for three years and then extended for five, in fact in law are you now exempt?

Senator McIlraith: That is for shipping.

Senator Connolly: That does not apply to the air industry; that is just shipping.

The Chairman: You mean, are the air transport people presently exempt under the existing law? Is that what you mean?

Senator Connolly: I thought that the umbrella created by the 1970 legislation, as extended, might have applied to the air industry, but I understand now it did not.

Senator McIlraith: That was only shipping.

The Chairman: I do not know why, unless there is some statutory provision, unless you can find relief.

Senator Laird: In other words, in the breweries case.

Senator McIlraith: It only applies to shipping companies.

The Chairman: We certainly have different thinking in two different departments of government relating to the same kind of operation. I do not know why the aviation industry should be ground between the two. Parliament set up the Canadian Transport Commission, and in the Aeronautics Act they have given the commission power to deal with tariffs and rates. There does not appear to be anything in the combines legislation that would protect them if they deal as they must in order to arrive at tariffs and rates. There are two departments of government aiming in different directions, and I do not know why the industry should be left suspended in mid-air when the government should be taking the responsibility of classifying it one way or the other. Instead of that they simply say, "We think the case law protects." I think I can safely say that it is not my view, that it is risky, and I know it is not Mr. Cowling's view.

Mr. Cowling: No. I think when Mr. Bertrand was before us the subject of air transport had not arisen at that time, but we were talking generally about the effect of the case law. He indicated that the case law might only be effective if certain regulatory bodies made some changes in their practices and in the way they were administering the law, so that leaves another area of doubt, because we do not know what he means by that.

The Chairman: In other words, you will have the department deciding whether the scope of operations and the practices of the Canadian Transport Commission are such that it can safely be said that the public interest is protected, and that decision will be a departmental decision. If they think it is not, then there is a prosecution.

Mr. Blair: Perhaps I might just add to that. I personally have participated in the last two years in two very hotly contested and bitterly fought rate cases before the Canadian Transport Commission on the application of air carriers for increases in rates. I think this is one reason why we have come here, because these matters are examined in public by a properly constituted authority, and it seems ludicrous that an important industry such as the air industry should then be subject to the uncertain possibility of some other agency of government stepping in and upsetting the regulations and decisions made by the Canadian Transport Commission under its authority.

The Chairman: I think you should add that the Canadian Transport Commission, which is constituted under the National Transportation Act, is defined as a court of record, and it has powers to conduct its hearings privately or publicly; it has all the investigatory powers under the Inquiries Act and has ample power to engage experts. As I understand it, they have a staff of technical experts whom they turn loose on any submissions made to them on air travel rates.

Mr. Cowling: I do not want to detain Mr. Blair, and perhaps Mr. Morrison can answer the question. I would be interested in knowing how those hearings came about. Were they on the initiative of the Canadian Transport Commission, or did somebody just happen to know that new rates had been filed, and decided to intervene?

Mr. Blair: There are no secrets before the Canadian Transport Commission. All the regulated companies have to observe certain formalities. The formality that governs any increase in rates is that they must file the intended rate at least 30 days before its effective date. Publicity is given to this in both instances that I refer to. The commission, of its own motion, decided that it was in the public interest that there should be a public inquiry into the new rates, and that inquiry was held.

Mr. Cowling: How did they give notice of that?

Mr. Blair: I think what they did in that case was they notified various agencies, such as provincial governments, by letter and they gave some form of public notice to the Canadian association, consumers who were interested, and others were notified.

Senator Laird: No smoke signals.

Mr. Blair: I think that within the limits of the time factors which prevailed, adequate notice was given.

Mr. Chairman, I do not suppose in our profession we are supposed to have views as to what happened but, as one who was there as a counsel, I would think there was a reasonably complete examination of all the factors involved. There is no question that the board staff, or the staff of the Canadian Transport Commission, which has been there for years and looking into such matters, conducted a most thorough investigation on its own account.

The Chairman: At least you can say this, Mr. Blair, there was the opportunity for full review.

Mr. Blair: Yes.

The Chairman: Before a commission that had the authority to deal with it.

Mr. Blair: Yes.

The Chairman: Now, that raises the question I stated earlier: If the commission is not exercising that authority properly, it is up to the minister and the government to put more teeth in the legislation. But to visit the consequences of that upon the industry and leave uncertainty as to the position of the industry is difficult to understand.

Thank you Mr. Blair.

I will now call on Mr. Morrison.

Senator Flynn: Mr. Chairman, since we received the representations from this group, has anything happened which would change the problem one way or another?

The Chairman: Well, this group that we have here now—Mr. Morrison, as I understand it—is concerned with domestic rates, as was IATA, the International Air Transport Association.

Senator Flynn: Is the problem different in any way, shape or form?

The Chairman: The problem is whether the amendment we dealt with for IATA goes far enough.

Senator Flynn: I was just wondering whether we were going to receive additional evidence, or if it was the same evidence that we received the last time.

The Chairman: As a matter of fact, Senator Flynn, I was thinking seriously that possibly what we should do is invite the Canadian Transport Commission to appear and tell us how they operate.

Senator Flynn: I have not changed my mind, I do not know if the authority has changed its mind, but if there is no additional evidence, the problem would be to discuss whether we should bring in an amendment or not.

Mr. Cowling: I think it may be important to get the domestic side of it from these gentlemen here today.

Senator Flynn: If it is different, I agree. I believe it is obvious that this part of the question is regulated.

Mr. Cowling: It would complete the record.

The Chairman: We dealt with one aspect in the amendment.

Senator Laird: Mr. Chairman, is it fair to ask Mr. Morrison, does he feel that the amendment, which we proposed, is not adequate for the purposes of the domestic end of the industry?

Mr. A. C. Morrison, President, Air Transport Association of Canada: Indeed, we do not, senator. We think it is fully adequate.

Senator Laird: Really, I agree with what Senator Flynn says. I have not changed my mind; I am all for this amendment.

Mr. Cowling: I think it would be advisable, honourable senators, for the record, to get some more information on the domestic side and to know a little more about the Air Transport Association—who its members are and how they operate in this field. I think it would be helpful.

Senator Laird: In other words, it makes the cheese more binding!

The Chairman: Well, whatever you call it; but it makes it more effective, shall we say.

Senator McIlraith: Mr. Chairman, the course of legislation through Parliament indicates that we may be amending and sending back a bill to the other place. It would be helpful if we had in the printed record the evidence upon which that amendment was based.

It will be recalled that last year, in the case of another bill where we made an amendment, we sent it back without the benefit of any evidence giving the reasons or supporting the amendment, or the evidence upon which the amendment was based. It would be quite important, in my view, that we have, as well as the impact of the bill as it now stands on the international civil aviation field, the impact of the bill as it now stands on the Canadian air transport field, in turn, in Canada. I would, therefore, like to hear what the Air Transport Association has to say. I suspect it will supplement the picture and complete it.

The Chairman: You have in your file, in your office, a complete set of *Hansard* of this committee dealing with this bill.

Senator McIlraith: Yes, I have it here.

The Chairman: The amendment is in the second report. I only dealt with IATA; at least, IATA is the name that appears, and it is the spur that made it move. Dr. Thomka-Gasdik of IATA was the man who appeared and gave evidence. We have that. If you wish that we incorporate in today's *Hansard* that report, for convience, we could quite easily do it.

Senator McIlraith: No, I was thinking, rather, of supplementing the evidence given by Dr. Thomka-Gasdik by the evidence of the Air Transport Association.

The Chairman: Yes.

Senator McIlraith: It does, I suspect, give an added dimension and support to the evidence of Dr. Thomka-Gasdik.

The Chairman: We could attend to today's *Hansard* of the committee, the earlier reports, so it is all in one document.

Senator McIlraith: I would like to see that done, Mr. Chairman.

Are you moving it?

The Chairman: I will see that it is done.

We will now hear from Mr. Morrison.

Mr. Morrison: Mr. Chairman, I appreciate very much the opportunity that you and the committee have given us to appear before you and put forward our very brief submission.

The Air Transport Association of Canada, with more than 285 members—and those are company members—encompasses every facet of commercial aviation, and its membership includes the two mainline carriers, Air Canada and CP Air, the five regional carriers, local service air carriers, chartered carriers, companies engaged in business aviation, helicopter carriers, fixed base carriers, aerial surveyors and flying schools. Its carrier members employ more than 40,000 people.

The association is pleased to support the recommendation made by this committee on June 26, 1975 in its second

interim report to the Senate, according to which Bill C-2 would be amended to exclude from the Combines Investigation Act certain agreements or arrangements affecting air transportation reflected in any written contract filed with the Canadian Transport Commission. The association now asks the committee to have the bill, as passed by the House of Commons on the 16th day of October 1975, amended to incorporate the recommendation.

The reason for our request is that the industry is already regulated in the public interest by the Canadian Transport Commission. Indeed, it has been recognized by the Department of Consumer and Corporate Affairs that service activities covered by regulatory laws would be exempted from the act. In that respect I would suggest that you look at "Proposals for a New Competition Policy for Canada", a publication of that department on Bill C-227, now Bill C-2, at pages 26 and 27. However, this immunity is said to stem from judicial interpretation and it is far from clear to what extent this judicial interpretation would cover the facts and circumstances of the commercial aviation industry.

The association is not asking for a privileged position with respect to government policy in this area, but it is asking for the elimination of any doubt concerning jurisdiction over the industry. Thus, the association submits that the Canadian Transport Commission, the regulatory body charged by Parliament with control over the industry, should remain the responsible body. Recognition of that will not, however, deprive the public of the benefit of the principle behind the new legislation, in that section 9 of Bill C-2 provides that, *inter alia*, the Director of Investigation and Research, upon his own initiative may, or upon direction from the minister shall, make representations to the responsible tribunal in respect of the maintenance of competition.

The association submits that it must be wrong in principle for Parliament to enact penal legislation which can only serve to place in doubt known and well-understood norms of conduct which serve the public interest and are necessary for the economic viability of the commercial aviation industry.

The Chairman: That completes your opening statement, Mr. Morrison? I take it, Mr. Cameron, you have nothing to add at this time.

Mr. H. D. Cameron, Vice-president, International and Corporate Services, CP Air: No, Mr. Chairman, but I would be quite happy to assist Mr. Morrison in answering any questions if some clarification is needed.

The Chairman: The one question I am concerned about, and I think the committee is as well, is how or in what manner you are regulated by the Canadian Transport Commission. What do they require you to do? How do they deal with you, and what do you have to account for in the determination of what the rates shall be?

Mr. C. I. Taylor, Vice-president, Public Affairs, Air Canada: Mr. Chairman, honourable senators, in specific relationship to rates before the Canadian Transport Commission, the carriers are, of course, required to submit their proposal of rates; they are required to submit evidence in support of those rates; and, if we can assume we are talking about rate increase, Mr. Chairman, we would have to justify those rate increases on the basis of cost and on the basis of what this would do in terms of the public on or over those routes to which the rates would be applicable. We are then subjected, as Mr. Blair sais earlier, to a public hearing, to public cross-examination by public interest witnesses, by officials of the Canadian Transport Commission and by, in fact, anyone who wishes and seeks leave to appear and to present evidence before that commission. The commission then takes it under advisement and, in some cases, will issue a stay of the effectiveness of the rates in order that there may be ample time for public interest witnesses to appear.

The Chairman: When you make your presentation to the commission, do Air Canada and CP Air make separate presentations or would that be preceded by discussions and conferences between or among the various air lines to be affected by these rates?

Mr. Taylor: In Canada for domestic rates it is fair, I think, to say that the proposals are set by the two main line carriers and that the regional carriers more or less follow the pattern which the two main line carriers establish. There is consultation between the two main line carriers, yet, unlike the international rates where there is one filing covering all carriers through IATA, before the Canadian Transport Commission there are individual tariff filings by each carrier. There is not one common filing; there are individual carrier filings. But the practice has built up that there are consultations between Air Canada and CP Air and the carriers prior to filing.

Senator Connolly: How many applications have you made since the establishment of the Canadian Transport Commission?

Senator Flynn: Which commission?

Senator Connolly: I mean the governing body, the CTC.

Senator Flynn: The Pickersgill Commission or the previous one?

Senator Connolly: Well, from the beginning. How often have you been there?

Mr. Taylor: Prior to the Canadian Transport Commission there was, of course, an agency called the Air Transport Board.

Senator Connolly: I did not want to go that far back.

Mr. Taylor: I would simply be taking a stab at this and perhaps Mr. Cameron could correct me, but I would say that since the establishment of the Canadian Transport Commission there have been two applications in the last two years, roughly. Prior to that there was a period of about 18 months in which there were no applications. Before that, I am just not sure. I believe there have been between three and five applications since the establishment of the Canadian Transport Commission. Perhaps some other witness could confirm or correct that.

Senator Connolly: Have those applications led to pretty full hearings?

Mr. Taylor: There have been only two, what I would refer to as full hearings, in that period, and those have been the last two of the sequence I have referred to.

Senator Connolly: In which you had consumer groups, public interest people, as you describe them, coming in and appearing and cross-examining—is that what you mean?

Mr. Taylor: Yes. There were consumer groups, and provinces intervened.

Senator Connolly: Whether or not you have these opposing interests, do the companies carry an onus which they must discharge before the CTC when they make a submission with respect to rate increases?

Mr. Taylor: The procedure, sir, is that we must file in advance so that there is ample time for the commission to determine, either on its own or by application from others, whether a public hearing is required. So in that sense we have an onus to file a tariff in ample time to permit the commission to hold a hearing, and we have to provide evidence to them in support of our rates so that they may make a determination.

Senator Connolly: In other words, you are discharging an onus when you supply this additional evidence.

Mr. Taylor: Yes, sir, I believe so.

Senator Beaubien: Mr. Taylor, can either of the big carriers increase their rates without the permission of the Canadian Transport Commission?

Mr. Taylor: No.

Senator Beaubien: They cannot increase them?

Mr. Taylor: No.

Senator Beaubien: If one increases the rate, the other increases it, too? Is it automatic that, if permission is granted by the Canadian Transport Commission, both will increase the rates? In other words, they always charge the same amount. Is that it?

Mr. Cameron: Perhaps, senator, I could comment on that. With one exception of some years ago, when there was, temporarily, a difference in rates, both companies charged the same basic rates. Now there are a few variations in our use of promotional fares. One company might decide to try to put on a special promotional effort in a certain field where it feels that the special rate will build up more revenue than is diverted; the other company may or may not decide to match that, and it in turn will use its judgment.

Senator Beaubien: Do they have to get the permission of the Canadian Transport Commission for those special rates?

Mr. Cameron: Yes.

Senator Beaubien: So you are completely regulated. If you want to increase your rates you have to get permission.

Senator Flynn: In a way I think it is more subtle than that. I think the practice is that you file your tariff with the commission, and if the commission is satisfied by just looking at it, and if there is no objection from the public, then your rates become effective at the date you have indicated in your notice. In other words, the commission can say no, but if it does not say yes, it is automatic that they will come into force with no objections from the commission. I think that is the way it goes.

Senator Beaubien: But they completely regulate it, just the same.

Senator Flynn: Yes, if you wish to put it that way, but the method of regulating is not the usual one.

Senator Connolly: I think that is the very point, however. It seems to me that what the witnesses have said—and this follows Senator Flynn's question—is that the applicant at all times has an onus to satisfy the commission. If the commission is not satisfied, then I think it can compel the applicant to come before the commission and deal with the situation.

Senator Flynn: That is right.

Mr. Taylor: That is so, sir.

Senator Connolly: That is the safety valve, I suppose.

Senator Molson: We have been talking about the main line carriers. There is a wide variation of function among all the other carriers. Do all the other carriers have to file rates with the Canadian Transport Commission, too? You have helicopters, you have bush companies, and so on. By the way, what is a fixed base carrier?

Mr. Morrison: He is basically a carrier like Laurentian Air Services in Ottawa, who operates out of a specific base, on charter services, specifically.

Senator Molson: Does not everyone operate out of at least one fixed base?

Mr. Morrison: There are some that do not; some are real nomads.

Senator Molson: The biggest floating crap game in the world! With the exception of the air surveyors and the training people, does not everyone file rates with the Transport Commission?

Mr. Morrison: With the possible exception of the air surveyors and the training people, the rest do. The rest are required to file a tariff; charter services, class 3 services, so called.

Senator Molson: Northern services? People based in the north?

Mr. Morrison: Yes.

Senator Connolly: In the case of aerial surveys, that is contract work by tender, or something approaching tenders, is it?

Mr. Morrison: Yes. It has almost always been on tender. We call them tender services. They are not required to file rates.

Senator McIlraith: Does the distinction not depend on whether the carriers are carrying passengers for pay? They are the ones who have to file rates and justify them, and so on. When you are dealing with a service that does not involve carrying passengers for pay, like spraying a crop of grain for purposes of weed killing, the position there is that they are not required to have their rates approved. It is the kind that carry passengers for pay that have to do that.

Mr. Morrison: Yes.

Senator Buckwold: Does the lowering of a rate have to have approval?

Mr. Morrison: There are two separate situations there. In the case of scheduled carriers, they have to submit it to the commission, and I take it that it is accepted and approved. In the case of charter carriers—the smaller charter carriers specifically and I am not talking about international carriers—they submit the lower rate to the commission, and it is not approved, it is accepted in those cases. It is accepted, or rejected if it seems to be a device to

perhaps undercut the competition. In a case like that the commission disapproves or rejects the tariff, and the carrier must file a new one.

Senator Buckwold: Does this happen very often?

Mr. Morrison: Not very often.

Senator Buckwold: I am trying to get into the competitive factor so far as the smaller carriers are concerned, and I think that is probably what worries the minister most.

Senator Molson: What about contract operations such as those carried out many years ago by Eldorado, and various others? I am talking about contracts between the carrier and some large exploration or mining company, or forest operation. It is as simple to file as a schedule of rates. Do those contracts have to be filed?

Mr. Morrison: Yes, sir, particularly if they divert from the filed tariff of the carrier. In many instances they are specific contracts, as you suggest, for mining companies—long term contracts, and so on.

Senator Molson: If the whole operation is set up for this purpose, there is no tariff at that stage. They would then have to file that contract. Suppose it is on a cost-plus basis, for the sake of argument, is that filed too?

Mr. Morrison: If they are a licensed carrier, they would have filed a tariff for their normal business, and then, when this contract came along, if they wished to depart from their filed tariff, they would have to file the new tariff with the commission for approval.

Senator Molson: I am really thinking in terms of things that perhaps do not exist today, but which existed a long time ago. For example, when a specific operation was opened up, it would have nothing to do with existing tariffs. Tariffs did not exist. There was nothing going on. I am thinking specifically of all the Labrador flying. There was no schedule, there were no bases, and they were set up to carry out the exploration for the iron ore in Labrador. Would that agreement between the Labrador mining and exploration company and the carrier have to be filed with the Transport Commission?

Mr. Morrison: I think that goes back to the days prior to the formation of the Air Transport Board. It was not until 1942, or whenever it was, that the board came along, and then they required the filing of tariffs. I think we have to bear in mind, in the cases you are referring to, that these are rates per mile or per hour, and usually, in the long term type of contract, you contract to put the aircraft at the disposal of the company for a given period of time. That is where you invariably depart from your tariff.

Senator Laird: Are you really stuck with rates per mile or per hour? In the case of your non-scheduled operators there must be a wide variation in destinations.

Mr. Morrison: Yes. The destination does indeed vary, but the rates do not vary very much. By types of aircraft we find that they become pretty competitive, and as a consequence there is not too much variation.

The Chairman: Mr. Morrison, to what extent does the technical service that the commission has look at and deal with any tariffs that are filed?

Mr. Cameron: Mr. Chairman, I know that the governing departments in the CTC examine such contracts and such tariffs as are filed very carefully, and from my previous term of office as president and chairman of the Air Transport Association I know that many contracts were turned back for further explanation or justification, so that they are very carefully studied. In the case of the main line carriers the history has been one of public hearings with regard to the last two major rate increases.

The Chairman: Would you say it is a wrong statement, or that there is an error in the statement, that all the airlines do is file a schedule of rates which they have agreed to with the commission, and then go about and carry on with those rates. Is that the procedure?

Mr. Cameron: I would say that would be a very wrong statement because our experience with the Canadian Transport Commission is that it exercises high regulatory powers over us in many, many sectors. It exercises them very thoroughly, and there is the particular example of the last two public hearings where it took a great deal of effort to place evidence on the record to show that these rate increases were needed by the industry and to convince the CTC that they were in the public interest.

The Chairman: I was looking at the regulations passed under the Aeronautics Act, and this is the authority of the commission. Have there been any cases where the commission has disallowed or suspended any tariff or toll that has been presented to it, as far as you know?

Mr. Cameron: I am thinking of the last case where fare increases were submitted, and then, after consultation, they were amended by the carriers and, in effect, a change of submission was made without as great an increase of fares.

Mr. Bowling: This was at some point half way through the hearing?

Mr. Cameron: Before the actual public hearing, so far as I recall.

The Chairman: A sort of preliminary discussion indicating the view of the commission, I suppose, and you fell in line by amending your filings?

Mr. Cameron: I believe in this case there was a public discussion indicating the view of the minister.

The Chairman: The second power they have has to do with the substitution of a tariff or toll satisfactory to the commission for whatever you may have presented. Has that occurred?

Mr. Cameron: Not, to my knowledge, in our case. I would guess that in some of the small chartered carrier applications the Air Transport Committee looks into it to be sure that the fares are compensatory, and I would hazard a guess that some have occurred, but I do not know of my own knouledge.

The Chairman: Then the third power they have is that the commission may prescribe other tariffs and tolls in lieu of the tariffs and tolls so disallowed by them. Have you experienced that?

Mr. Cameron: I have not, no.

The Chairman: The word "prescription" there bothers me a bit. I presume it means prescribed by regulation—that is, that the commission may prescribe by regulation—

Senator Flynn: A guideline like in Bill C-73.

The Chairman: Have there been cases where the commission has prescribed other tariffs or tolls in lieu of tariffs or tolls disallowed?

Mr. Cameron: Not to my knowledge; not in our case.

The Chairman: Although it might happen in the case of smaller carriers and charter firms?

Mr. Morrison: I am not aware of anything happening; I am well aware of something disallowed or thrown back to the carrier, but I am not aware of anything prescribed.

The Chairman: Why do we run into this expression, when talking to departmental officers, that the commission "does not approve of tariffs or tolls"? What is the origin of that? In anything they do, could you say there was an approval?

Mr. Taylor: I think it arises from the fact that the carriers file tariffs and the commission has the power to suspend. In practice they just suspend or reject the tariff. If they do not suspend or reject it, then it comes into force and is in fact an approved tariff.

The Chairman: Is there anything that the commission does, or any notice or direction that it issues when it does not reject or disallow, from which you conclude that they have approved and you can operate under those schedules?

Mr. Cameron: I think that the actual definitive action of approval is not taken by any document; it is just the lack of any rejection or change.

Senator McIlraith: Within the time.

Senator Connolly: Yes, the passage of time cures it.

The Chairman: If you don't reject and if you don't disallow, and if you don't substitute and if you don't prescribe, then you conclude that the schedules proposed meet the requirements of the commission?

Senator McIlraith: That is right, provided you fail to do those things within the prescribed time set out in the first document. It is a negative way of approaching the situation instead of a positive one.

Senator Connolly: I wonder, Mr. Chairman, if we are not in a position, where we say to the people proposing this bill as it stands without this amendment, "Really you have to justify before our committee your position that the existing controls are not adequate before you can put any more controls in." Is that a reasonable position for us to take?

The Chairman: Is that the way to state it, that they are not adequate, or that the practice of the commission, under whatever authority they have, is not adequately exercised? Is that not more the nature of the attitude of the department?

Senator Flynn: If it was not adequately exercised, it would be up to the government to correct the legislation relating to the Transport Commission. But you cannot correct that situation with this.

The Chairman: But my thinking is this, if you have the right to disallow or reject or substitute or prescribe, and you do not exercise any of those authorities, is that an adequate review in the public interest? The authority would appear to be there.

Senator McIlraith: Is that the question we have to decide here, Mr. Chairman? Assuming they are not adequately protecting the public interest, surely that is not by itself a reason for our enacting this legislation now before us. It would merely be a reason for the appropriate authority taking the action to correct that situation, and that is quite a different thing.

The Chairman: But we have no indication that there is any action of any kind that would be critical of the way the commission operates.

Senator McIlraith: No, there is not a particle before us.

Senator Connolly: On the contrary, it seems to me that when the legislation establishing the commission came before us, what the authorities were doing was saying, "This is going to be a great protection to the public." It was sold on that basis, and I would like to say one other thing if I may, Mr. Chairman. It seems to me that the kind of protection the Canadian Transport Commission provides for the public is, first of all, a continuing thing, because every time this industry wants an increase in its rates it has to make an application. The impact of Bill C-2 depends upon an initiative on the part of the government and on the part of the authorities where they step in believing that a criminal offence has been committeed. Now they have first of all to discover the existence of the evidence to establish that there has been a criminal offence. However, it will not be continuing, but will necessarily be a sporadic operation. There is a continuing type of surveillance in the case of the CTC legislation but here, as I say, it will be sporadic in the aviation industry if it is suspected that a criminal offence has been committed.

The Chairman: No; the only thing we have is that the Director of Investigation and Research did initiate proceedings in connection with the Shipping Conference rates. He conducted a full-scale investigation and reported to the Restrictive Trade Practices Commission that they were operating against the public interest and in violation of the criminal provisions of the act. Since that was determined to be a cartel, but in the public industry, that question has been resolved and there is a parallel situation as between the Shipping Conference and air travel rates. Do we not have to conclude that the public interest is being looked after properly and, therefore, there should be an exemption? Was that your point?

Senator McIlraith: Yes, that is the point.

The Chairman: Do you agree with that?

Senator McIlraith: Yes.

Senator Macnaughton: That is the point we adopted in the international field.

The Chairman: Yes.

Mr. Cowling: Could I ask the witnesses how many members of the Air Transport Association are also members of IATA?

Mr. Morrison: Air Canada and CP Air are members of IATA, and I believe Eastern Provincial Airways and Quebecair are associated members.

Mr. Cowling: So that they would be participating in these discussions between carriers, which Dr. Thomka-Gazdik told us about when he testified earlier this summer, having to do with the preparation of international

rates. My question is: Is there any relationship at all between the international rates that develop out of the IATA rate-making conference system and the domestic rates? Could we say that we start with an international rate and work up the domestic rate, or does it go the other way around, or is there any connection between the two at all?

Mr. Taylor: I do not think it would be fair to say that there is no connection, but there is very little relationship, or connection if you wish to put it that way, between the establishment of domestic rates and international rates per se. The carriers, of course, come before the commission because international rates have to be approved as well by the aeronautical authorities, through the commission. These rates are constantly before us, and the commission and the carriers do not wish to see them becoming sort of disproportionate one to the other. In my opinion, it would be fair to say that there is no direct relationship between the two. In other words, international rates do not have to be set in advance of decisions made with respect to domestic rates directly.

Mr. Cowling: Then the domestic rates might have some influence on the international rates.

Mr. Taylor: Yes, in a country with the geography of Canada, with a number of international gateways enabling travel from Western Canada to Europe either directly or by way of Eastern Canada, there is a relationship that must be maintained, but for rate-making purposes and the filing of tariffs one does not succeed or precede the other.

The Chairman: You made use of an expression, "the aeronautical authorities". That expression occurs in bilateral agreements between countries. I have been looking at one between Canada and the U.K., and the start of international rates is an agreement between two countries on the question of international air travel rates. I take it that that is in conformity with the Convention on Civil Aviation which was entered into and became known as the "Chicago Convention", which goes way back. In that convention reference was made to the "aeronautical authorities of one contracting party," et cetera, may agree with the aeronautical authorities of the other. Who are the "aeronautical authorities" so far as Canada is concerned?

Mr. Cameron: In a bilateral air agreement those references to "the aeronautical authorities" cover such matters as air fares, but also may cover safety requirements—

The Chairman: That is right.

Mr. Cameron: —and so on. So the interpretation usually is that the aeronautical authorities are those bodies which act usually for the Minister of Transport in those certain fields. Therefore the Canadian Transport Commission is considered to be "the aeronautical authorities" on those matters within its jurisdiction, mainly air fares. The Ministry of Transport air administration, which looks after air safety, would be "the aeronautical authorities" which would be responsible for matters of airworthiness and so on.

The Chairman: Yes. Then I notice that in the agreement, for instance, with the U.K. it is provided that the negotiations of air travel rates shall be dealt with through IATA. So that these agreements recognize that in the international field IATA his the organization which deals with, by agreement of the two governments, the question of settling what the rates shall be. Then those rates, I take it, must go to the aeronautical authorities. That would be the Canadian Transport Commission; is that right?

Mr. Cameron: Yes, sir.

The Chairman: So you are really getting to government level in the settlement of rates. The government itself is not a personality. We say "the government does this" or "the government does that." that means some persons do that, and in this case it is the Canadian Transport Commission.

Senator Connolly: Arising out of your last statement, Mr. Chairman, where does the CTC get jurisdiction to deal with international rates?

Mr. Cameron: I would think it is contained in the Aeronautics Act.

Senator Connolly: No, but even if it is stated there, is it a legal jurisdiction? Does it have authority to deal with international rates? This is the "Canadian Transport Commission" and these are rates to be charged not on domestic operations but on international routes.

Mr. Cameron: The bilateral agreements executed between the two countries are, in effect, treaties between those countries. One of the clauses contained in those treaties, in most cases, is that air fares will be set in a certain manner. They are first, I believe, discussed between airlines, preferably through, or through IATA.

Senator Connolly: I can understand IATA having some jurisdiction by agreement. That is a matter of contract. But a treaty cannot confer a jurisdiction on a domestic entity within Canada.

Senator McIlraith: Yes, it can. If there is an agreement between two countries, and the agreement provides that the carriers will be designated, and so on, that the rates will be governed by such-and-such a body and that body has the power given to it by statute to hear such cases, then there is legal jurisdiction.

Senator Connolly: I am not talking about the jurisdiction that arises out of contracts. I am talking about the jurisdiction that otherwise would not obtain but is conferred by treaty. I just raise the question. Perhaps it is not an important point. The machinery works.

The Chairman: Can anyone answer that question? Can you, Dr. Thomka-Gazdik?

Dr. J. Thomka-Gazdik, Q.C., Assistant Director General and General Counsel, International Air Transport Association: Mr. Chairman, my answer might not be satisfactory. So far as I know, all these agreements are filed with the Canadian Transport Commission. On a number of occasions, whether or not the Canadian Transport Commission has the power under law, they have made reservations and conditions through those agreements. Regarding the second point, of carriers filing their fares based on those agreements, that is where the Canadian Transport Commission exercises full power—those powers referred to earlier this morning.

Mr. Cowling: Dr. Thomka-Gazdik, is there anything in the law of the National Transportation Act or the Aeronautics Act, which would give the commission jurisdiction to deal with those agreements? I am talking about the stage prior to the tariffs. You say that on occasion they have, perhaps through friendly persuation or other means,

brought about changes in those agreements. Is there anything in the law which would entitle the commission actually to amend them?

Dr. Thomka-Gazdik: I would find it difficult to find an express provision to that effect. There is some provision which I believe the commission is using to exercise its authority, which they have exercised over past years.

Mr. Cowling: Is it on a voluntary basis that these agreements are being filed, by understanding with the commission, or by an order?

Dr. Thomka-Gazdik: Under instruction by the Canadian carriers, IATA files these agreements on their behalf. I presume they had instructions from their governments and wanted to have those agreements. I think they wanted those agreements in virtue of the international agreement, to which the chairman referred earlier—the international agreement between Canada and the United Kingdom.

Mr. Cowling: When you say "government," do you mean the Minister of Transport or the CTC?

Dr. Thomka-Gazdik: In relation to fares, the reference is to the CTC.

Senator Connolly: It may be an arrangement by contract, between contracting parties, whether or not they be governments. I am not disputing that, but I do not know how the CTC, which is a domestic regulatory body, can influence international rates.

Mr. Cameron: Mr. Chairman, the foreign air carriers which serve Canada must obtain a licence from the CTC. They are licensed by the CTC for the performance of international air traffic.

Senator Connolly: The performance of that part of international air travel that takes place in Canada.

Mr. Cameron: I believe for services covered by the treaty between the two countries.

Senator Connolly: The important point here, it seems to me, is whether the air transport industry in Canada is already sufficiently regulated to the point where it should be exempted from this act. That is the issue.

Mr. Cameron: Mr. Chairman, I would like to supplement something that Senator Connolly said a while back, namely, that the supervision, and inspection, if you wish, by the Canadian Transport Commission is quite a regular matter. We have to file continually our financial reports, reports of the number of people carried between various places, and so on. We regularly have to file with them a great amount of detail; so they are kept extremely well advised of every detail of our operation.

Mr. Cowling: Mr. Chairman, I think the important thing is that there is supervision by the CTC. It is also fair to say, to put it quite bluntly, Mr. Cameron, that you probably would not be here if it were not for the fact that the carriers do carry out consultations prior to filing the rates; and we know that in the case of international rates those consultations are required, in many cases and in most cases, as a term of an agreement between Canada and other countries.

But could you, for the record, give any support for consultation taking place with respect to the fixing of domestic rates? Are there any peculiarities of the air lines' business which make this a necessity? It has obviously been recognized on an international level. Therefore, it would be logical that the same thing would apply on the domestic level. But, for the record, we should perhaps have some explanation of that.

Mr. Taylor: One of the reasons for the machinery in the international field, I suppose, is to bring reason out of chaos, because there are 112 international airlines. In Canada, of course, there are fewer airlines. We think some of the reasons are similar domestically.

We also have policy statements by the minister, charging the domestic carriers, both main line and regional, to cooperate and, in the interest of the public, to bring about a better air service within Canada. We believe also that the argument in favour of consultation is similar to the international, in that it brings about a more orderly rate structure within the industry, with less chaos; and we believe that the public benefits from this. I should like to expand on that on the basis of the continuing supervision which the commission carries out through the carriers.

The Chairman: Just on that point, are you still dealing with international?

Mr. Taylor: No; I am dealing with domestic.

The Chairman: May I interject, on the international side, by saying there is a provision in article 7 of the U.K.-Canada agreement which specifies exactly this point. It says:

> The tariffs referred to in paragraph (1) of this Article shall, if possible, be agreed in respect of each route between the designated airlines of the contracting parties, in consultation with other airlines operating over the whole or part of that route, and such agreement shall, where possible, be reached through the rate-fixing machinery of the International Air Transport Association. The tariffs so agreed shall be subject to the approval of the aeronautical parties.

So you have it as a matter of agreement at the government level as to the method of doing this internationally.

Senator Molson: It would be interesting to see what kind of a crack at that the combines people could take, Mr. Chairman.

The Chairman: I am sorry, Mr. Taylor, that I cut into your domestic argument.

Mr. Taylor: On the domestic side, we do not have the kind of formal directive that we have under the international treaty; but we do have formal directives from the Minister of Transport to cooperate between the carriers.

If I could use an example, the rates, of course, being economic rates, have a relationship to the level of service that will be provided. If the rates are not economic, the carriers, of course, will be withdrawing service in the light of the traffic patterns. The commission, in its continuing monitoring of this, has conducted what it has called adequacy and service hearings in regions of Canada. There was such a hearing conducted just recently in the Atlantic region. There was some concern that because of the economics of the region, because of the rates that were being charged and the level of traffic, perhaps service was being withdrawn. The commission conducted a public inquiry throughout the Atlantic region, as a result of which the carriers were asked to cooperate to a greater extent in maintaining the proper level of service. Also, there were

comments made with respect to the rates being charged. So, we are in fact under a type of general direction of cooperation within Canada, although not quite as formal as the direction we operate under internationally.

The Chairman: There is authority in the National Transportation Act for the Minister to direct the commission to do those very things.

Mr. Taylor: Yes, Mr. Chairman.

Senator Cook: Mr. Chairman, it seems to me that the committee is in complete agreement with the merits of the case put forward by IATA. As I understand the minister's decision on this, he feels that all commercial activities will be subject to the act, as amended, unless they are subject to government regulations, and that the exemption from regulating activities is not stated in the bill, nor in the existing act, but arises from past judicial interpretation of the act.

We agree with the merits of the case before us. Everyone is in agreement, including the department, that it is a regulated industry, but we do not agree that it is exempt through past judicial interpretation.

It seems to me that the next stage is for the minister to convince us, the committee, that in fact the industry is exempt through past judicial interpretation, or for this committee to convince the minister that it is not and that, therefore, the amendment should go forward.

Senator McIlraith: Mr. Chairman, I support the view that the next move should be for the committee to have the minister before it—and I am not certain which one is the appropriate minister, but whichever minister it might be. The airlines, by the very nature of their operations, are monopolies. They have to be monopolies, with either one line flying from point A to point B, or two, or three, or four, as the case may be.

The Chairman: What you mean is that each airline has to behave as though it were a monopoly.

Senator McIlraith: Yes, and the traditional method of the government in granting monopolies licences to carry on their operations, whether in the communications field or in the transport field, or whatever, is through a licensing process which takes place before a regulatory body. All morning we have been discussing the regulatory body, but no one has taken any of our time to tell us why that traditional position of governments over the years in regulating monopolies, or near monopolies, through regulatory bodies, should be confused or confounded by raising the possibility of regulating such industries through the Combines Investigation Act, competition in Canada and matters of competition under the investigative penal provisions that flow from the investigative procedures.

That basic case, surely, has to be made. There may be one, but if there is I, for one, am not aware of it, and I am unable to think of any case that might be made for it. If there is a case to be made, we should hear about it. Otherwise, this committee will have to take the appropriate action to exempt the operations of airlines from this bill, as the Shipping Conference was exempted from combines investigation. This exemption can either be through special legislation or by simply deleting the appropriate clause of this bill, but surely it is clear that the airline industry has to be exempted, unless the department can convince us otherwise.

The Chairman: I suppose you might get the same answer in relation to airlines, if the question were raised, as was given in relation to the Shipping Conference, that being that if we want a stable operation which is in the best interests of the public, and the movement of goods at as reasonable a price as possible, then these combinations are necessary; they are in the public interest.

Senator McIlraith: The airlines, it seems to me, have an even stronger case in relation to the public interest than that of the Shipping Conference, because the shipping lines are not monopolies and are not as tightly licensed along the way as are the airlines.

Senator Cook: There are also international complications involved.

Senator McIlraith: The shipping lines are free to move and enter other countries without the approval of the other countries, whereas the airlines are not. In my view, the case is much stronger for special treatment, whatever form that may take, in respect of the airlines.

I think we have to address ourselves to the case to be made in support of the legislation rather than to the case to be made for that special exemption. I think the case has been made for the point raised by IATA and the Air Transport Association of Canada. That case has been made, and we are only whipping it and whipping it. In my view, we should now address ourselves to the question of whether or not there is a case to be made for the legislation.

The Chairman: Would you apply, as a test, the following question to the proposition you have put forward: Is competition lessened by reason of the way in which rates are set up, the procedures that are followed, and the consultation that takes place?

Senator McIlraith: I would answer that, first of all, by saying that competition is controlled by the governmental authority, in any event, and the rate structure—

The Chairman: You mean through the licensing process?

Senator McIlraith: Yes, and the other areas covered by the CTC. The CTC, in any event, controls the airlines, and the rates, I should think, do not directly affect that at all.

Senator Connolly: Mr. Chairman, I wonder whether the collective or individual wisdom of the committee might be able to tell us whether there is any substantial body of law built up that does in fact exempt a regulated industry such as this one from the application of the Combines Investigation Act, and whether there are any cases that in fact exempt this industry from the application of the Combines Investigation Act. A great man said in the Senate, in explaining this bill, that the exemption for regulated activities is not stated in the bill, nor in the existing act; that it arises from past judicial interpretation of the act. Is there a body of past judicial interpretation of the act to that effect?

Mr. Cowling: There are only two cases in Canada, Senator Connolly, one being the breweries case, which involved provincial legislation, and because it involved provincial legislation it, perhaps, brought into question the matter of competing jurisdictions. By coincidence, while you were talking I was asking Mr. Blair whether he recalled the farm products marketing case, and whether that involved federal or provincial legislation.

Senator Connolly: That was a federal case; that was back in the 1930s.

Mr. Cowling: In that case it was held that because it was in the public interest there was no need for involvement of the Combines Investigation Act.

Senator Connolly: In other words, what we are saying is that we do not know of any past judicial interpretation which is going to exclude this industry from the application of the Combines Investigation Act.

Mr. Cowling: No, and the experience in the United States gives some cause for concern. Notwithstanding that an industry is regulated there, the courts have recognized that the anti-trust laws, as they call them, have a place. There was a recent case in the Supreme Court of the United States involving stockbrokers, with regard to their commissions, which are uniform and supervised by the SEC. A civil action under the anti-trust laws was taken by, I think, a consumer group. It went all the way to the Supreme Court and was dismissed on the facts of that particular case. In other words, they recognized that there might be circumstances in which there was an opening for the application of the anti-trust laws, and they talk about the doctrine of implied repeal and that kind of thing.

Senator Cook: After Senator Connolly has read that extract, I can say from personal experience it was the voice of Jacob but the hand of Esau.

Senator Connolly: In other words, I think the committee must conclude that if this industry is seeking protection from the effects of Bill C-2 it must be provided in the bill, because there is no judicial interpretation to help them. Is that not it?

Senator Laird: We should not take a chance.

The Chairman: That is right.

Senator Laird: If the department agrees that that is the state of the case law, what is wrong with making it certain by codifying it?

The Chairman: You would have to study the facts presented in evidence in the breweries case and the facts presented in the farm products marketing board case.

Senator Laird: Anyhow, the clincher is that competition is still wide open as to which can hire the prettiest girls!

Mr. Cowling: Perhaps we could put one further fact on record, which I think is important. We have talked about shipping and airlines, but the railways are, I was going to say, in somewhat the same "boat".

Senator Molson: The same "line".

The Chairman: We cannot put the railways in a boat!

Mr. Cowling: Sometimes that happens between Prince Edward Island and the mainland. One might ask why the railways are not asking for the same kind of thing, and I think it important to note that probably the reason they are not here is that section 279 of the Railways Act specifically recognizes consultations and agreements among railways. They are subject to the CTC as well so far as their final rates are concerned. However, prior agreements are specifically referred to in the statute, and that was probably thought necessary at the time because railways tend to deal with articles more than airlines, which are involved with passengers. There was a suggestion prior to services coming under the Combines Investigation Act that, even though you were providing a service, if the service related to an article you might come under that. Therefore we can see the probable reason for section 279 of the Railways Act coming in when it did.

The Chairman: This is a form of exemption.

Mr. Cowling: Right.

The Chairman: Because it is positive or affirmative; it gives them the right to meet and establish common rates.

Senator McIlraith: It gives them the obligation more than the right.

The Chairman: I would like to ask one question. Are you satisfied that the amendment we proposed in our second interim report is adequate to cover your position with respect to domestic rates?

Mr. Taylor: Yes, we are.

The Chairman: To meet your position they would not have to make any change in the language?

Mr. Taylor: No, sir.

The Chairman: Are there any other questions?

Senator Macnaughton: That would be a good place to stop.

The Chairman: Gentlemen, we very much appreciate your appearing before us. You have given us a lot of useful information, and you may have concluded in a sort of general way, a subtle way, what our thinking is.

Before we adjourn, may I say that we have reserved the right to meet when the Senate adjourns this afternoon. This is only the beginning of our study of this bill in an official way. There are many other points. We have no further witnesses at this moment, unless we feel that we should ask the Canadian Transport Commission to appear. As the evidence opened up this morning it seemed to me to be less and less necessary to do that, because the case for the amendment and the exemption, speaking only as the chairman, appears to be so strongly supported on the evidence that we do not need them.

Senator Molson: What about the Minister of Transport?

The Chairman: I am not sure. We are going to hear the Minister of Consumer and Corporate Affairs at some stage. I think we are well prepared to deal with him on this subject.

Senator Molson: And perhaps some others.

The Chairman: If the Senate rises at, say, 3.30 or so this afternoon it might be of some value to meet to pick up other points where the bill now before us has not included amendments we proposed or recommendations we made. I think the box score is that we recommended about 22 amendments, of which 13 have been accepted in whole or in part. There are some other important ones, such as the civil action for damages, which strikes me as being very important. What would happen under the bill as now drawn is that somebody can bring an action against, say, a company for damages because he has been hurt by reason of a breach of the criminal law by a corporation. There would then be a judge on the civil side having to make a finding that there was a breach of the criminal law, even though no prosecution had been commenced. That just

does not seem to bring the right way. It may well be that after the action has proceeded there will be a prosecution which may fail, but the judge in the civil action may have already given judgment for damages.

Senator McIlraith: There might be two different standards of requirement of proof in the two cases.

The Chairman: We can either say that if an action is started before a prosecution has been instituted and concluded the action shall be stayed until such time as that happens, or we can say that civil damages can be sued for only in the event of a prosecution having terminated successfully as far as the Crown is concerned. Certainly, to leave it the way it is seems to create a lot of undesirable possibilities. Then there is something in the penalties and the language they have used. I think they have discussed at least three different ways in connection with fines. There is a clear provision in the Criminal Code which lays down what the law is, so I think we should have a look at this. The question is, shall we have that look this afternoon?

Senator Cook: Mr. Chairman, on this point, would it help if we had a short memo of the outstanding points?

The Chairman: Yes. Mr. Cowling has done that. That is what he was going to discuss with us if you feel you can devote some time this afternoon, say, if the Senate rises at 3.30 p.m. I do not think it is going to be a long afternoon. Is there any objection to meeting even if it is only for an hour or an hour and a half?

Senator McIlraith: Not if it is kept relatively short.

Senator Desruisseaux: Why not come back at 3 o'clock?

The Chairman: We will adjourn until the Senate rises this afternoon.

Mr. Cowling: Mr. Chairman, before we adjourn, I should like to note that Dr. Thomka-Gasdik, on behalf IATA, has been here this morning. He was listed on the agenda. In fairness, we should state that he offered to come and answer any further questions that there might be at this time. It was not his intention to make a further submission because he made his submission in April.

It might have been while you were out of the room, but he was able to respond to a couple of questions which arose during the quesioning of the witnesses from the Air Transport Association of Canada. As far as I am concerned, I have no further questions of Dr. Thomka-Gasdik. He is here though in case anyone has any questions.

The Chairman: I do not think Dr. Thomka-Gasdik, that we have said anything this morning that you might regard as being some kind of heresy.

Dr. Thomka-Gasdik: I was very pleased to be here this morning.

The Chairman: We will adjourn until the Senate rises this afternoon.

The Committee adjourned.

APPENDIX "A"

SECOND INTERIM REPORT

Thursday, June 26, 1975

On October 16, 1974, the following order of reference was made by the Senate:

"That the Standing Senate Committee on Banking, Trade and Commerce be authorized to examine and report upon any bill relating to competition in Canada or to the Combines Investigation Act, in advance of the said bill coming before the Senate, or any matter relating thereto;

That the Committee have power to engage the services of such counsel, staff and technical advisers as may be necessary for the purpose of the said examination; and

That the papers and evidence received and taken on the subject in the preceding session be referred to the Committee."

Pursuant to the above order of reference, your Committee now presents its Second Interim Report as follows:

Since your Committee's Interim Report, dated March 18, 1975, on the subject-matter was tabled, it has been brought to its attention by the International Air Transport Association that the Candian Government has entered into air transport agreements with the Governments of Australia, Belgium, Denmark, Fiji, France, the Federal Republic of Germany, Ireland, Israel, Italy, Jamaica, Japan, Mexico, the Netherlands, New Zealand, Pakistan, Peru, Switzerland, the United Kingdom and the United States.

These agreements require, directly or indirectly, that airlines should reach agreements in respect of tariffs and, where possible, this should be done through the Traffic Conference system of the International Air Transport Assocation which was incorporated by Act of Parliament in 1945, and recently amended to enable charter carriers to be admitted to membership. The resulting agreements must be filed with the Canadian Transport Commission and the Commission has control over the tariffs resulting therefrom.

As Bill C-2 would extend the application of the *Combines Investigation Act* to "services", the making of such an agreement might constitute an offence under the Act, thereby jeopardizing the entire international air transport rate-making system which has been recognized by the Canadian Government up to now.

In your Committee's opinion there is at least a reasonable doubt as to whether jurisprudence under the present provisions of the *Combines Investigation Act* holding that an industry whose activities are regulated by a government body are, to that extent, exempt from the application of the Act, would cover the position of Canadian air carriers. Your Committee considers that the public can be better protected through regulation and control of air transportation matters by a single government agency and accordingly recommends that agreements affecting air transportation should be specifically exempted from the application of the *Combines Investigation Act* as amended by Bill C-2. The following is a suggested text of a provision to be inserted in the Act for this purpose:

"4.3 This Act does not apply in respect of agreements or arrangements affecting air transportation reflected in any written contract filed with the Canadian Transport Commission pertaining to the pooling or apportioning of earnings, losses, traffic, service, or equipment, or to the establishment of transportation rates, fares, charges or classifications, or for preserving and improving safety, economy and efficiency of operations, or for controlling, regulating, preventing or otherwise eliminating destructive, oppressive or wasteful competition or for regulating stops, schedules and character of service, or in respect of other co-operative working arrangements including the collective selection and administration of agencies for the sale of air transportation."

Respectfully submitted,

Salter A Hayden,

Chairman.

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FIRST SESSION—THIRTIETH PARLIAMENT
1974-75

THE SENATE OF CANADA

PROCEEDINGS OF THE

STANDING SENATE COMMITTEE ON

BANKING, TRADE AND COMMERCE

The Honourable SALTER A. HAYDEN, *Chairman*

Issue No. 58

THURSDAY, NOVEMBER 6, 1975

Complete **Proceedings on Bill S-30, intituled:**

"An Act to incorporate Continental Bank of Canada"

REPORT OF THE COMMITTEE

(Witnesses: See Minutes of Proceedings)

29641—1

THE STANDING SENATE COMMITTEE ON BANKING, TRADE AND COMMERCE

The Honourable Salter A. Hayden, *Chairman*

The Honourable Senators:

Barrow
Beaubien
Buckwold
Connolly
(*Ottawa West*)
Cook
Desruisseaux
Everett
*Flynn
Gélinas
Haig
Hayden
Hays
Laird
Lang
Macdonald
(*Cape Breton*)
Macnaughton
McIlraith
Molson
*Perrault
Sullivan
Walker—(19)

**Ex officio* members

(Quorum 5)

Order of Reference

Extract from the Minutes of the Proceedings of the Senate, October 30, 1975.

"Pursuant to the Order of the Day, the Honourable Senator Connolly, P.C., moved, seconded by the Honourable Senator McIlraith, P.C., that the Bill S-30, intituled: "An Act to incorporate Continental Bank of Canada", be read the second time.

After debate, and—
The question being put on the motion, it was—
Resolved in the affirmative.

The Bill was then read the second time.

The Honourable Senator Connolly, P.C., moved, seconded by the Honourable Senator Everett, that the Bill be referred to the Standing Senate Committee on Banking, Trade and Commerce.

The question being put on the motion, it was—
Resolved in the affirmative."

Robert Fortier,
Clerk of the Senate.

Minutes of Proceedings

November 6, 1975
(75)

Pursuant to adjournment and notice the Standing Senate Committee on Banking, Trade and Commerce met this day at 9:30 a.m.

SUBJECT: *Bill S-30—"An Act to incorporate Continental Bank of Canada".*

Present: The Honourable Senators Hayden (*Chairman*), Barrow, Connolly (*Ottawa West*), Desruisseaux, Flynn, Haig, Laird, Lang, Macdonald (*Cape Breton*), Macnaughton, Molson and Walker.—(12)

Present, not of the Committee: The Honourable Senators, Benidickson, Lafond and Smith (*Colchester*).—(3)

In Attendance: Mr. R. L. duPlessis, Acting Assistant Law Clerk and Parliamentary Counsel.

WITNESSES:

Mr. C. L. Read, Inspector-General of Banks;

Mr. J. S. Land, President, IAC Limited, Toronto;

Mr. S. F. Melloy, Executive Vice-President, IAC Limited, Toronto;

Mr. F. P. Paradis, Senior Vice-President, IAC Limited, Toronto;

Mr. J. L. O'Brien, Q.C., Montreal;

Mr. R. S. O'Brien, Q.C., Montreal;

Mr. James C. Baillie, Toronto; and

Mr. D. G. Blair, Q.C., Parliamentary Agent.

The Committee proceeded to the consideration of the above Bill and examination of the witnesses, following which it was proposed that amendments be made to the Bill as follows:

Clauses 7, 4(*a*), 10; 11; 11(*a*); 12(1); 15(1); 16(1); 17(1), (2) and (3); 18(*d*); 19; 20 and 23.

Upon motion of the Honourable Senator Macnaughton it was *Resolved* that the above amendments be adopted.

The Honourable Senators Molson and Desruisseaux abstained from voting on the above Bill.

It was further *Agreed* that the list of the above amendments be incorporated in the proceedings of this date.

Following discussion, and upon motion duly put, it was *Resolved* to report the said Bill as amended.

At 11:35 a.m. the Committee adjourned to the call of the Chairman.

ATTEST:

Frank A. Jackson,

Clerk of the Committee.

Report of the Committee

Thursday, November 6, 1975

The Standing Senate Committee on Banking, Trade and Commerce to which was referred Bill S-30, intituled: "An Act to Incorporate Continental Bank of Canada" has, in obedience to the order of reference of Thursday, October 30, 1975, examined the said Bill and now reports the same with the following amendments:

1. *Page 3:* Strike out lines 38 to 45, inclusive and substitute therefor the following:

"(*a*) IAC Limited may, notwithstanding Sections 53 and 54 of the Bank Act,

(i) subscribe for shares of the capital stock of the Bank at not less than par value and cause to be registered in the name of IAC Limited the shares issued pursuant to such subscriptions, and

(ii) exercise, in person or by proxy, the voting rights pertaining to shares of the capital stock of the Bank registered in the name of IAC Limited;"

2. *Pages 5 to 7:* Strike out lines 17 to 49, inclusive, on page 5, all of page 6 and lines 1 to 31 on page 7 and substitute the following:

"10. (1) IAC Limited and the Bank shall, within ten years after the coming into force of this act,

(*a*) subject to subsection (2), amalgamate in accordance with the *Canada Corporations Act* or the *Canada Business Corporations Act,* whichever Act applies to IAC Limited at the time of the amalgamation, as if the Bank were a corporation subject to the Act that applies to IAC Limited, or

(*b*) amalgamate in accordance with sections 100 to 102 of the *Bank Act*, as if IAC Limited were a bank to which that Act applies,

and, subject to subsections (4) to (6), the Bank after the amalgamation is subject in all respects to the Bank Act.

(2) If the *Canada Business Corporations Act* applies to IAC Limited at the time of the amalgamation and, if immediately prior to the amalgamation, IAC Limited owns all of the outstanding shares of the capital stock of the Bank,

(*a*) subsection 178(1) of that Act applies to an amalgamation under paragraph 1(*a*), and

(*b*) the resolutions referred to in paragraph 178(1)(*b*) of that Act may vary from the requirements set out in that paragraph to the extent necessary to give effect to section 11 of this Act.

(3) Prior to an amalgamation under paragraph (1)(*b*), the Governor in Council may, by order, prescribe that, notwithstanding subsection 101(2) of the *Bank Act*, the terms of the proposed amalgamation agreement need not be submitted to the shareholders of IAC Limited.

(4) Subject to subsection (6), if, when an amalgamation under subsection (1) takes effect, there is outstanding any indebtedness of IAC Limited, other than the debentures referred to in subsection (5), that is of a kind that the Bank is not permitted to incur under the *Bank Act*, then notwithstanding the *Bank Act*, any such indebtedness incurred prior to October 28, 1975, remains outstanding after the amalgamation as indebtedness of the Bank and is binding upon and enforceable against the Bank in accordance with its terms, including any terms as to security.

(5) Subject to subsection (6), if

(*a*) an amalgamation under subsection (1) takes effect prior to July 15, 1984, and

(*b*) on the day when the amalgamation takes effect there are outstanding any debentures that carry rights of conversion into shares of IAC Limited to be issued on such conversion

then, notwithstanding the *Bank Act*, during the period from the day the amalgamation takes effect until July 15, 1984, the rights of conversion under any of those debentures that were issued prior to October 28, 1975 remain outstanding as rights of conversion into shares of the Bank and shares of the Bank may be validly issued during that period upon the exercise of the rights of conversion except that shares of the Bank may not be so issued to a person from whom a subscription for a share of the capital stock of the Bank could not, by reason of paragraphs 53(4)(*a*) or (*b*) or subsection 56(2) of the *Bank Act*, be accepted by the Bank.

(6) Subsections (4) and (5) apply to any indebtedness and any debentures referred to therein only if

(*a*) the terms thereof do not permit the debtor, at its option, to discharge the indebtedness or the debentures prior to the amalgamation, whether or not the discharge would require payment by the debtor of a premium or bonus; and

(*b*) the Minister of Finance consents to the application of those subsections to that indebtedness or those debentures upon submission to the Minister made by IAC Limited that it has attempted to arrive at alternative arrangements that would avoid the necessity of relying upon those subsections as to that indebtedness or those debentures.

(7) The submission referred to in paragraph (6)(*b*) shall be accompanied by an undertaking to discharge the indebtedness at the first date upon which it may be discharged at the option of the debtor, whether or not upon payment of a premium or bonus.

(8) Any indebtedness referred to in subsection (4) and any debentures referred to in subsection (5) that have not met the conditions set out in subsection (6)

shall be discharged prior to an amalgamation under subsection (1).

(9) For greater certainty, all of the provisions of the *Canada Corporations Act*, the *Canada Business Corporations Act* or the *Bank Act*, as the case may be, relating to the effects of an amalgamation apply to an amalgamation under subsection (1), except as provided in this section and in section 11.

(10) The Bank may enter into such agreements as may be reasonably necessary to confirm that any indebtedness to which subsection (4) applies remains outstanding after the amalgamation as indebtedness of the Bank, and that any debentures to which subsection (5) applies are convertible after the amalgamation into shares of the Bank to be issued on such conversion."

3. *Page 7:* Strike out lines 32 to 35, inclusive, and substitute therefor the following:

"The Bank shall be the continuing corporation resulting from the amalgamation of the Bank and IAC Limited referred to in subsection 10(1) so that,"

4. *Page 7:* Strike out lines 41 and 42 and substitute therefor the following:

"mence business when the Bank was originally permitted under that section to commence business."

5. *Page 8:* Strike out lines 16 to 22, inclusive, and substitute therefor the following:

"*Act* apply to IAC Limited and sections 38 to 56 of the *Bank Act* apply to the shares of IAC Limited, and"

6. *Page 10:* Strike out lines 20 to 27, inclusive, and substitute therefor the following:

"15. (1) During the period commencing on the day this Act comes into force and ending on the expiration of two years next following that day or on the day on which an amalgamation under subsection 10(1) takes effect, whichever occurs first, a person referred to in subsection 2(1) is not ineligible, notwithstanding paragraph 18(5)(*b*) and subsection 18(6) of the *Bank Act*, to be elected or appointed a director of IAC Limited by reason of his being a director of a bank, or of a bank to which the *Quebec Savings Banks Act* applies or of any company referred to in subsection 18(6) of the *Bank Act*, but no person who, but for this subsection, would be ineligible for election or appointment as a director of IAC Limited may hold in IAC Limited any of the offices referred to in section 21 of the *Bank Act* or continue after the expiry of that period to be a director of IAC Limited."

7. *Page 11:* Strike out line 38 and substitute therefore the following:

"is a subsidiary of IAC Limited (any such corporation being hereinafter in this section and in sections 17 to 19 called a "restricted corporation"), to carry on"

8. *Page 12 and 13:* Strike out lines 22 to 43, inclusive, on page 12 and lines 1 to 17, inclusive, on page 13 and substitute therefore the following:

(*a*) IAC Limited may acquire, and may permit any restricted corporation to acquire,

(i) assets from the Bank previously acquired by the Bank as permitted by the *Bank Act* (such assets and other assets which the Bank is permitted to acquire under the *Bank Act* being hereinafter in this section called "eligible assets"), and

(ii) eligible assets from IAC Limited or any restricted corporation,

but the prior consent of the Inspector General of Banks shall be required for the acquisition of any eligible assets that consists of shares in the capital stock of a corporation, other than a corporation that is a subsidiary of IAC Limited when this Act comes into force;

(*b*) IAC Limited may acquire, and may permit any restricted corporation to acquire, assets for the purpose of leasing such assets to its customers, and IAC Limited may enter into leases of any such assets and may permit any restricted corporation to enter into leases of any such assets, and

(*c*) IAC Limited may lend money or make advances, and may permit any restricted corporation to lend money or make advances, upon the security of real or immovable property in Canada or of an equity of redemption therein or of an assignment of or mortgage on the interest of a lessee thereof where such loans or advances would not be permissible for the Bank by reason of the restrictions contained in subsections 75(3) or 75(4) of the *Bank Act* (the said loans and advances and leases of assets referred to in paragraph (*b*), being hereinafter in this section referred to as "non-eligible assets"); and

(*d*) IAC Limited may acquire, and may permit any restricted corporation to acquire, non-eligible assets from any other of those corporations.

9. *Page 13:* Strike our lines 22 to 25, inclusive, and substitute therefor the following:

"assets held by IAC Limited and every restricted corporation be in excess of the aggregate value,"

10. *Page 13:* Strike out lines 33 to 36, inclusive, and substitute therefor the following:

"gible assets held by IAC Limited and every restricted corporation, excluding those non-eli-"

11. *Page 14:* Strike out lines 23 to 25, inclusive, and substitute therefor the following:

"By IAC Limited or any restricted corporation in any other of those"

12. *Page 14:* Strike out lines 35 to 37, inclusive, and substitute therefor the followwing:

"IAC Limited or any restricted corporation is under no obligation to"

13. *Page 14:* Strike out lines 42 to 45, inclusive, and substitute therefor the following:

"If the Bank or IAC Limited or a director of the Bank or IAC Limited is, in the opinion of the Minister of Finance, in contravention of any requirement of section 8, 9, 12"

14. *Page 15:* Strike out lines 27 to 29, inclusive, and substitute therefor the following:

"tion 15(1) of the *Bank Act*, the provisions of this Act that affect or restrict IAC Limited, the subsidiaries of

IAC Limited or the shares of IAC Limited shall cease to have effect, except that subparagraph 7(4)(*a*)(ii) and paragraphs 7(4)(*b*) and (*c*) shall remain in effect for purposes of giving effect to subsections 15(2) to (9) of the *Bank Act*."

Respectfully submitted,

Salter A. Hayden,
Chairman.

The Standing Senate Committee on Banking, Trade and Commerce

Evidence

Ottawa, Thursday, November 6, 1975

The Standing Senate Committee on Banking, Trade and Commerce, to which was referred Bill S-30, to incorporate Continental Bank of Canada, met this day at 9.30 a.m. to give consideration to the bill.

Senator Salter A. Hayden (*Chairman*) in the Chair.

The Chairman: Honourable senators, we have for consideration this morning, one bill, S-30, which is a private bill. This is an act to incorporate Continental Bank of Canada.

We have quite a gathering of representatives in connection with our hearing of this bill. The main panel who will be here to answer questions, in addition to Mr. Blair, will be: Mr. J. S. Land, the President of IAC; Mr. S. F. Melloy, the Executive Vice-President of IAC, Toronto; and Mr. F. P. Paradis, Senior Vice-President, IAC, Toronto. Then there are: Mr. J. L. O'Brien, Q.C., Montreal; Mr. R. S. O'Brien, Q.C., Montreal; Mr. James C. Baillie, Toronto; and Mr. D. G. Blair, Q.C. Mr. Blair is a familiar figure from time to time at our sittings.

The order of proceeding will be as follows. Mr. Blair has a short opening statement; and then we will have the panel, as I call them—that is, Messrs. Land, Melloy and Paradis.

Mr. Blair?

Mr. D. G. Blair, Q.C., Parliamentary Agent: Thank you, Mr. Chairman.

Honourable senators, the chairman has said all that I had intended to say by way of introduction of the three witnesses and the other people who will be sitting to the side and who will be able to assist you if detailed questions are raised; so with your permission, Mr. Chairman, I will introduce Mr. Land and then retire.

The Chairman: Well, don't run too far away, because we may want to talk to you at times.

Senator Macnaughton: Could I ask a question of Mr. Blair? What is your time schedule on this bill?

Mr. Blair: We face a difficult situation in the House of Commons, Senator Macnaughton. As you know, there are very few private members' hours. There is one today, November 6, and the next private members' hour at which this bill could be brought forward will be on the 20th, two weeks from today. Private members' hours will then occur every alternate week thereafter; that is, every fortnight. Looking ahead, therefore, we only have a very small number of private hours available to us over in the other place.

Senator Macnaughton: Do you hope to get it through this session?

Mr. Blair: Yes, we do. We have been in touch with members of the house and our sponsor, and we have high hopes that the bill will go through; but we should do our very best to get it over there as quickly as possible.

Senator Macnaughton: Thank you.

The Chairman: Are there any other questions of Mr. Blair? Thank you, Mr. Blair.

Mr. Blair: I now introduce Mr. Land, Mr. Melloy and Mr. Paradis.

The Chairman: Gentlemen, since you are going to carry the burden of answering the questions, will you come forward?

Now, Mr. Land, are you going to make the opening statement?

Mr. J. S. Land, President, IAC Limited, Toronto: Yes, Mr. Chairman.

The Chairman: Will you proceed?

Mr. Land: Thank you, Mr. Chairman.

Mr. Chairman and honorable senators, on October 30 Senator Connolly, in moving second reading of Bill S-30, gave an excellent explanation of what we propose; and, in addition, explanatory notes have been circulated. I shall therefore, with your agreement, confine my remarks to a few basic points.

IAC Limited desires to become a bank for the following reasons:

1. To improve its ability to serve an established market of individuals and small and medium sized businesses;

2. To broaden the range of financial services it can provide to those customers through the addition of banking services, which would constitute a natural adjunct to its existing activities;

3. To attract additional funds from institutional investors and individuals and to put its equity capital of more than $200 million to more effective use.

4. To employ its trained and efficient staff more effectively.

5. To be of sufficient size to compete effectively with existing chartered banks.

In short, IAC believes that it can make a worthwhile contribution to the Canadian economy as a chartered bank. I might say that we held a special general meeting of shareholders and have the complete concurrence of that group in what we are proposing.

The exemptions requested in the bill are necessary because IAC is a large, established financial company, publicly owned, with assets in excess of $2 billion. In order

to accomplish the objective of becoming a chartered bank a transition period is necessary.

Since it is proposed that IAC and the bank, as chartered, would amalgamate and become one within ten years, both IAC and such bank would be subject to the Bank Act upon creation of the bank. Therefore some latitude is necessary during the interim period.

Once the bank has been created and commences business, all eligible business—that is, eligible for a bank—will be written in the bank.

Thank you, honourable senators. Now we would be pleased to answer questions.

The Chairman: I suppose the proper way of describing the two institutions would be, for our purposes, to call IAC a non-bank, and we could call the one you are seeking to incorporate a bank.

Mr. Land: That is right, Mr. Chairman.

The Chairman: And IAC at the present time is a non-bank because many of the interests that they have are not eligible investments for a bank.

Mr. Land: Some of them are not, Mr. Chairman; that is quite true.

The Chairman: I would say, perhaps, a substantial part of them.

Mr. Land: I would say that the bulk of our business would be eligible for a bank, with the notable exception of leasing capital assets and of high ratio real estate mortgage lending.

The Chairman: Well, you have at least one subsidiary insurance company.

Mr. Land: That is something that we would obviously have to do something about.

The Chairman: That is not an eligible investment for a bank.

Mr. Land: That is right, sir.

The Chairman: Then there is this transition period of ten years, and the bill says that within ten years you must take proceedings to amalgamate IAC and the bank, but in the meantime the bank would be a subsidiary of IAC.

Mr. Land: A wholly-owned subsidiary.

The Chairman: And I suppose a substantial shareholder of the bank from the very beginning would be IAC.

Mr. Land: Complete ownership.

The Chairman: The bank would carry on the business of banking, and I assume that IAC would in some respects use its facilities for its purposes and for financing.

Mr. Land: All business which could be done by the bank would be written in the bank through the efforts of the current IAC staff. They would use their expertise for the purpose of developing business for the bank.

The Chairman: How will the staff be provided? Will it be provided from the staff of IAC?

Mr. Land: Yes, sir, possibly supplemented with specialists if necessary. We have currently 2,800 employees all thoroughly experienced in the granting of credit and the handling of financial transactions, and this would mean the original staff looking after the affairs of the bank.

The Chairman: Who will tell us what has been done in the way of discussions and indicated approval in the Department of Finance in connection with this proposal to incorporate a bank?

Mr. Land: Discussions have been held with the Department of Finance, the Inspector General of Banks and the central bank, the Bank of Canada, and these have led to the conclusion that our petition would be acceptable to the officials in the form in which it has been submitted.

The Chairman: When you say "acceptable", you mean they would not raise any objections to this bill to incorporate a bank even with the background ownership of IAC?

Mr. Land: That is right. That is my understanding.

Senator Laird: Mr. Chairman, may I follow up from something you started? Is it really necessary to have this entire ten-year time lag to make the complete conversion?

Mr. Land: We would hope not, senator. The ten years is the maximum period. It is quite conceivable and in many ways it would be desirable to accomplish the amalgamation before the ten-year period.

Senator Laird: Do you think you could do it? What would hold you up from making the conversion?

Mr. Land: We have certain outstanding debt obligations, some of which cannot be called prior to maturity.

Senator Laird: And what would the maturity be on your longest running securities?

Mr. S. F. Melloy, Executive vice-président IAC Limited, Toronto: The longest term debt goes to 1994, and we can call the debt by 1989. But most of the debt is callable, with penalty, by 1984.

Senator Laird: I see. I suppose that is why you fixed on the ten-year time lag. Is that right?

Mr. Melloy: Yes.

Senator Laird: Would you contemplate the possibility of, even with penalties, taking care of that situation within ten years, as Mr. Land suggested was possible?

Mr. Melloy: Any debt that is redeemable, we will redeem and pay the penalty.

Senator Laird: Do you have some that are not redeemable with a penalty?

Mr. Melloy: Most become predumable in on before 1984, but some are not redeemable up 1989, so we would have to leave them until 1989, unless we can make other arrangements.

Senator Laird: From what you say it would appear that it will be most unlikely that you will be able to speed the process up, since 1984 appears to be the point to which you will have to go to meet most obligations presently existing.

Mr. Melloy: Unless we can make satisfactory arrangements with lenders to do so before.

Senator Laird: Outside the contract.

Mr. Melloy: Yes.

Senator Connolly: I understand, Mr. Chairman, if I may follow that up—principally because I was the sponsor of the bill and I know this, or at least I think I know it—that if there is unmatured debt at the time the amalgamation takes place, there is a provision in this bill that the bank will assume the responsibility for that debt.

The Chairman: That would be part of the amalgamation agreement.

Senator Connolly: But that is in the bill.

Mr. Land: Yes, it is.

Senator Walker: That cannot in any way lengthen the period beyond ten years, can it? There will be many opportunities in the meantime to try to make a deal too clean up this debt.

Mr. Melloy: Yes, we will make some effort in that direction.

Senator Walker: One of the chief advantages of forming a bank is that you have $200 million in equity, and if the bank charter were granted you could use that to greater advantage. Would you elaborate on that?

Mr. Land: Yes, senator. Normally institutional lenders accord to companies such as sales finance companies a leverage ratio or a ratio of debt to equity of something in the area of five-to-one or six-to-one. We have achieved the ratio of approximately seven to one. In certain of our trust deeds there is a stipulation that the maximum consolidated ratio cannot exceed ten to one. As a bank, with the controls imposed on banks and the supervision, lenders feel secure in allowing a greater leverage, so that it is possible to borrow more money relative to each shareholder dollar. This, of course, in turn permits economies and is very advantageous.

Senator Lang: What leverage, Mr. Land, would you expect to attain as a bank?

Mr. Land: We would not have any illusions as to the great growth of our leverage in the early years of the bank. For example, I would hardly think that we would anticipate the kind of ratios we hear about occasionally, such as twenty-five to one, thirty to one, and so on. It might be reasonable a little way down the road, when the bank has established some kind of a track record, to be looking for, perhaps, twenty to one, which is the normal trust company type of ratio.

Senator Macnaughton: Mr. Land, some of your directors may find themselves holding two directorships, or directorships in two banks, if you wish, at the same time.

Mr. Land: Yes, senator.

Senator Macnaughton: Yes. Would you care to comment?

Mr. Land: Yes, Senator Macnaughton. We do have some directors who are directors of other deposit-taking institutions. The company has requested these directors to remain on for an interim period with our board. That is the reason we have asked for the exemption contained in the bill, in order to permit an orderly replacement. Of course, the exemption does not apply to IAC officers, as that any of us who have interlocking directorships must resign the other directorate to remain directors and officers of IAC.

Obviously, a sudden resignation of a number of directors could create a lack of confidence on the part of institutional investors, shareholders or customers. Also, we think we have a very strong and very competent board, and it takes a little while to replace people of this stature. So, we, of course, at this point do not know what the directors involved will decide. We have asked them to stay on to allow an orderly transitional period.

The Chairman: I take it that in the early days the directors of IAC will be the directors of the bank.

Mr. Land: That is correct, senator.

The Chairman: So all you have to do is canvass them to see if they wish to become directors of the bank and retain their present directorships.

Mr. Land: Yes.

The Chairman: And the bill permits that.

Mr. Land: The bill permits that, and I think that part of the rationale of making this request is that at the time the banks and trust companies were asked to look after the situation of interlocking directorships they had approximately two years, which is what we are asking here.

Senator Walker: How many shareholders have you, Mr. Land?

Mr. Land: We have approximately 12,000, senator.

Senator Walker: What percentage of them are Canadian?

Mr. Land: Ninety-six per cent are Canadian.

Senator Desruisseaux: How many approve of this?

Mr. Land: We held a special general meeting of shareholders and I think it would be safe to say that we had absolute unanimity. One shareholder was a little concerned because he had some preferred shares and the price of the preferred shares is down now, so he did not vote with the motion, but there was only one. Other than that, it was completely unanimous.

Senator Walker: You were completely unanimous except for the "one-share Sweeney" type.

Mr. Land: As a matter of fact, senator, the one gentleman was a very fine man; it was a token gesture.

Senator Walker: So was Sweeney a fine man in his own way.

Senator Barrow: What are the main exemptions from the Bank Act you are seeking during this period?

Mr. Land: Perhaps I could call on counsel to answer that. He could do a much better job than I, senator.

The Chairman: Mr. Baillie, the question, as you know, is to develop the differences in this bill as against the provisions of the Bank Act.

Mr. James C. Baillie, Counsel for the Petitioner: I understand that, sir, and I understand that the specific concern, naturally, is with what exemptions are provided.

The Chairman: Yes.

Mr. Baillie: Perhaps it is appropriate to refer to them in two or three general categories. Clause 7 of the bill, sena-

tors, contains a number of provisions which either constitute exemptions from, or modifications of, the Bank Act during what we term the interim period, which is that period from the date the bank is incorporated until the date that the amalgamation occurs. There are a number of them which are corollaries of the necessity for the bank to be a wholly-owned subsidiary of IAC Limited during that interim period because, of course, the Bank Act does not contemplate that a bank will be a wholly-owned subsidiary of another corporation.

Going very quickly through Clause 7, Clause 7(1) is in the category of what I would call a technical provision to allow the bank to be a wholly-owned subsidiary of another corporation.

The Chairman: At that stage, when the bank is incorporated, the substantial majority of the issued shares would be held by IAC; is that correct?

Mr. Baillie: All the issued shares, yes.

The Chairman: So making the exemption as you have it certainly will not hurt the shareholders other than IAC?

Mr. Baillie: I would not think it would.

The Chairman: You would not have any other shareholders.

Mr. Baillie: I would agree with that, senator. These exemptions seem to be not only desirable but essential to the whole structure that is proposed to the committee.

The Chairman: Why would you say "essential"?

Mr. Baillie: Because, senator, the target of the entire exercise is to convert IAC Limited into a bank. I stress the word "convert". There is no suggestion here to add a bank to the IAC complex; there is no suggestion that the bank would be just one part of a big conglomerate. The proposal is to convert IAC Limited into a bank.

The Chairman: That is the effect of the amalgamation.

Mr. Baillie: That is correct, and in the discussions with the senior government officials and with tax advisers and others, it was concluded that the only feasible way in which to convert IAC Limited into a bank would be through the organization of a wholly-owned subsidiary which would eventually amalgamate with IAC. That is why I used the rather strong word "essential" to describe these exemptions, which are designed to allow the bank to be a wholly-owned subsidiary of IAC Limited.

The Chairman: There is no way at this time by which IAC Limited could otherwise become a bank.

Mr. Baillie: That is our judgment, senator; yes.

The Chairman: When I say "become a bank," I mean become a bank in the evolution period, which is up to ten years.

Mr. Baillie: That is correct, senator. Another technical provision required to accomplish that objective is clause 7(2), which contemplates that the general meetings of the shareholders of the bank would be comprised of the single proxy representative of IAC Limited.

Clause 7(3) is the provision to which Mr. Land alluded a few minutes ago which allows a two-year period within which interlocking directorates with other deposittaking institutions would be eliminated, to bring both the bank and IAC Limited into complaince with the Bank Act. I refer to IAC or well as the bank because during this interim period the bank and IAC Limited must have identical boards of directors.

Clause 7(4) contains a number of specific provisions. Clause 7(4)(a) is, again, a technical provision. The sections of the Bank Act which are referred to in clause 7(4) (a) are those sections which, in effect, state that no one shareholder may have more than ten per cent of the shares of the bank. Of course, an exemption from that section was necessary in order to permit IAC Limited to own all of the shares of the bank.

Senator Connolly: In the interim period.

Mr. Baillie: Yes. That is made clear, I believe, sir, in the opening lines of section 7(4) which say:

> During the period commencing on the day this Act comes into force and ending on the expiration of ten years next following that day or on the day on which an amalgamation under subsection 10(1) takes effect, whichever occurs first,—

The Bank Act, of course, requires that a director of a bank has qualifying shares, and must own shares on which not less than $5,000 have been paid up.

Since this bank will be wholly owned by IAC Limited, it would not have been feasible for the directors of this bank to comply with that requirement. Therefore clause 7(4)(b) substitutes a requirement for the ownership of 500 common shares of IAC Limited as the qualifying share requirement.

Senator Connolly: During the interim period?

Mr. Baillie: Yes sir. Clause 7(4)(c), again speaking to the interim period, is perhaps one or the most technical provisions in this group of exemptions.

The Bank Act contains two limitations on interlocking directorates: one, a prohibition on interlocking directorates with other deposit-taking institutions; secondly, in section 18(7), a prohibition against interlocking directorates, more than 20 per cent of the member of the board of the bank being also on the board of any one other corporation. This bank—again during the interim period—will have interlocking directorates with its parent corporation because another clause of the bill requires that the boards be identical, which is a glorious interlock.

Senator Walker: We do not seem to have that word here—"glorious."

Mr. Baillie: A 100 per cent interlock. In addition, there will be some interlocks with other existing subsidiaries of IAC Limited, and clause 7(4)(c) says that during this interim period those interlocks with the parent corporation and other subsidiaries of IAC Limited will be permitted, notwithstanding the Bank Act.

Senator Benidickson: For how long a period?

Mr. Baillie: For up to 10 years, or the date of the amalgamation, whichever is earlier.

Clause 7(4)(d) is a very narrow provision dealing with what is sometimes referred to as the "Mercantile" section of the Bank Act. That section of the Bank Act says that during the time in which any one shareholder holds more than 25 per cent of the shares of a bank, the growth rate of

that bank is restricted. I think honourable senators will be aware why I referred to that as the Mercantile section. IAC Limited will be holding more than 25 per cent—to be precise, 100 per cent—of the shares of the bank during the interim period, and therefore exemption from that section is required. It will be clear that the reason for that section being added to the Bank Act is not relevant here.

Senator Benidickson: Even though some senators may know something about the word "Mercantile," perhaps there should be an explanatory note in the record as to what it means.

Mr. Baillie: It is presumptuous of me to speak to that. Perhaps Mr. Read, the Inspector General, when he is speaking later, will correct anything I say. My understanding is that the section was put in to deal with a very specific situation, of a U.S. financial institution owning initially 100 per cent of the shares of a Canadian bank. As I understand it, an arrangement was worked out and it was decided that the growth rate of the Canadian bank be restricted until the ownership of that U.S. financial institution was brought down to the 25 per cent level. That was the purpose of the section.

Senator Benidickson: Do you recall the period of time for that allowance?

Mr. Baillie: My understanding is that there was no period of time. The understanding was that as long as over 25 per cent was held by the United States parent, the limitation on growth was in effect. There was no period of time prescribed in which it should drop down to below the 25 per cent level.

Senator Macnaughton: So the bank is now qualified, in that it owns about 24 per cent?

Mr. Baillie: I cannot speak to that. I believe it is below 25 per cent.

The Chairman: Senator Benidickson, I think the wording of 75(2)(g) is that:

> at any time after the 31st day of December 1967 or after such later day, not being a day later than the 31st day of December 1972, as may be prescribed—

That is your time limitation period.

Senator Benidickson: For this, but—

The Chairman: No, not for this. This is an exemption from that provision. This provides an exemption, in that the limitation does not apply to this bank.

Senator Laird: At the present time, who are the directors?

Mr. Baillie: Perhaps that question could be directed to Mr. Land.

Mr. Land: We have Mr. F. M. Covert, Director, Royal Bank of Canada; Mr. J. S. Dewar, Director, Toronto Dominion Bank; Mr. C. F. Harrington, Chairman and Director, Royal Trust; Mr. D. Kinnear, Director, Bank of Montreal; Mr. L. A. Lapointe, Director, Toronto Dominion Bank; Mr. Charles Rathgeb, Director, Royal Bank of Canada; Mr. Renault St. Laurent, Director, Banque Canadienne Nationale; Mr. Thackray, Director, Bank of Montreal; Mr. Yorath, Director, Montreal Trust Company; and Mr. Courtois, Director and Vice-President, Bank of Nova Scotia. We have quite a mixture, senator.

Senator Laird: I am not saying anything derogatory about them. I merely felt that it should be on the record.

The Chairman: If there are no further questions, please go ahead, Mr. Baillie.

Mr. Baillie: Regarding the next provision of clause 7(4), since this is a somewhat complex bill, we will have to refer to other clauses of the bill. The next provision of clause 7(4) requires just a minute of explanation.

The Bank Act contains a requirement for a limitation on the amount of residential mortgages that any chartered bank can acquire. That limitation states, in effect, that for an established chartered bank the maximum amount of residential mortgages it can acquire is equal to 10 per cent of the aggregate of its deposits and its banks debentures.

It goes on to say that for a newly incoporated bank, the bank builds up to that level over a period of eight years. So that if Parliament tomorrow were to incorporate a new bank, that bank could only build up its portfolio of residential mortgages to the 10 per cent level over an eight-year period.

The effect of clause 7(4)(e) is to say that this bank, the Continental Bank, would from day one be allowed to invest up to the 10 per cent limit in residential mortgages. It is relevant to note that other clauses of the bill would permit IAC Limited and certain of its subsidiaries also to have investments in residential mortgages.

That provision has some business overtones. If there are any questions, perhaps they could be directed to Mr. Land.

The Chairman: Are there any questions?

Senator Walker: Have there been such exemptions as set out in this bill? In other words, are there any precedents for this, in the formation of a bank, to your knowledge?

Mr. Baillie: I have no knowledge of any other situation in which an existing financial institution has sought conversion into a bank. It perhaps follows, as a corollary, that I hav no knowledge of any situation in which exemptions such as this have occurred.

Senator Walker: Is it correct to say that it is only because of that situation, the conversion of IAC to a bank, that these exemptions become necessary?

Mr. Baillie: That is our jugment, senator. There are some that have business overtones, but the basis of them is predicated on the fact that we are converting an existing financial institution into a bank.

Senator Molson: Mr. Chairman, I want to declare at the outset that I am a director of a chartered bank and, for that reason, I do not intend to vote on this bill. I should also say that I am in favour of further competition in the banking field. I think it is an excellent thing for an organization of such great standing as IAC Limited to enter the banking field because of its background, experience, and organization.

There is one question I should like to ask at this stage, if I may. I am somewhat puzzled as to why the boards of directors of IAC and Continental Bank necessarily have to be identical. For example, why could the board of the Continental Bank not be a selected group of directors—perhaps of IAC personnel, or nominated by IAC? Why must the two boards be identical? That point was made in Mr. Land's evidence, if I am not mistaken, and I am just curious as to the reason for that.

Mr. Land: That is right, Senator Molson, and, subject to correction by counsel, I believe that this was a stipulation of the government officials.

Is that not right, Mr. Baillie?

Mr. Baillie: That is correct. Perhaps I might elaborate. I would not want to leave the implication, or impression, that this stipulation was in any way regarded by us as an unreasonable one. Speaking from a business as well as a legal point of view, I think it is fair to say that the reason why the governmental officials requested this stipulation was to make it clear that they wanted the bank and IAC Limited to be administered together.

The target of this exercise is to convert IAC Limited into a bank. Given the best of all possible worlds, the bill would touch a magic wand to IAC Limited thereby converting it into a bank. However, for a lot of technical reasons that could not be done, and the feeling was that, as a second best, the boards of directors of the two institutions should be made identical in order to avoid any divergence of policies arising out of any disagreement between the two boards. I think that is a fair summary of the reason why that stipulation was requested.

The Chairman: At that stage, IAC Limited would be the sole shareholder of the bank.

Mr. Baillie: That is correct.

The Chairman: It would have its money invested in the shares of the bank and, therefore, would have a very substantial, a very real, interest in being as close to the investment policy of the bank as possible.

True, the depositors would also have an interest, but I think we have to assume that perhaps there would be some relationship between the depositors and the shareholders, because the shareholders would have a responsibility vis-à-vis the depositors.

Senator Connolly: It is my impression, Mr. Chairman, as a result of the study I had to make to present this bill in the Senate, that the onus that is cast upon the bank to arrange for the amalgamation is equally shared by IAC Limited. The onus is upon both to work towards the amalgamation within the stipulated time, namely, a maximum of 10 years.

Mr. Baillie: That is correct.

Senator Molson: I think the answer that it eliminates any possible divergence of policies is a good answer, Mr. Chairman. It would seem to be logical.

Mr. Baillie: Mr. Chairman, to give the background perhaps I might refer, before I comment on the next clause that is relevant to the question of exemptions, to two provisions that I think are important, one being found in clause 9 of the bill, which would prohibit the bank from lending money to IAC Limited or to any corporation that is a subsidiary of IAC Limited. This was included at the request of the governmental officials in order to deal with that potentiality.

Also of importance, of course, is clause 10, which deals at length with the amalgamation procedure. Perhaps I could come back to clause 10 in a moment, Mr. Chairman, after commenting on one other clause.

The Chairman: Very well.

Mr. Baillie: The other clause on which I should like to comment is clause 12, which is a general clause. It states that during the interim period it is recognized that IAC Limited is not a bank, but that it should be made subject to certain of the provisions of the Bank Act; and those provisions of the Bank Act are the ones that govern the transfer and registration of shares, and the ones that govern the election of directors and officers.

Clause 12 is a general statement to the effect that those provisions of the Bank Act are, in their entirety, applied to IAC Limited during the interim period. That, of course, dictates, as a corollary, the need for a number of technical and one or two substantive exemptions.

The technical exemptions are to be found in clause 12(1) on page 8 of the bill. Clause 12(1)(b) applies to the board of IAC Limited the same requirement that we saw a moment ago as being applicable to the board of directors of the bank, namely, the requirement that in order to qualify as a director one must hold 500 shares of IAC Limited.

Also, there is a provision in the Bank Act which requires that a bank maintain current at all times a list of its significant shareholders to be available for reference by the appropriate regulatory authorities and by the public. Clause 12(1)(c) says, in effect, that there is no point in having the bank maintain such a list because it will have only one shareholder, but that IAC Limited must maintain such a list, and, to equate as closely as possible to the Bank Act, IAC Limited will be required to maintain a list of those registered shareholders who are registered as holders of more than 250 shares of the company.

The Chairman: Will it be possible under this bill for the shareholders of IAC, or some of the shareholders, to dispose of their shares in this interim period?

Mr. Baillie: Yes, Mr. Chairman.

The Chairman: There is no prohibition against that?

Mr. Baillie: No, Mr. Chairman.

The Chairman: So, conceivably, at the end of this 10-year interim period there could be different personalities as shareholders and directors of IAC Limited.

Mr. Baillie: Yes, Mr. Chairman.

The Chairman: And the corollary of that would be that they may influence the policies and the operations of the bank.

Mr. Baillie: While I agree with everything you have said, Mr. Chairman, there is an additional qualifying item. The Bank Act, out of concern over undue influence by the shareholders on the affairs of the bank, includes certain protective provisions limiting, for example, the size of any one shareholding that can be voted. Those protective provisions, subject to one exemption which I will refer to in a moment, are embodied in this bill as being applicable to IAC Limited.

Senator Benidickson: What does the Bank Act say as to the limitations on shareholdings?

Mr. Baillie: The Bank Act says two things, Senator Benidickson, the first being that the board may not accept a transfer of shares if, as a consequence of that transfer, the receiving shareholder will hold more than 10 per cent of the shares. It also says that anyone who does hold more

than 10 per cent, whether through nominee holdings or otherwise, may not vote any of his shares.

As I said, there is one exemption, and subject to that one exemption, which I will refer to in a moment, this bill would make applicable to IAC Limited the full rigor of that requirement.

Senator Benidickson: So, that would arouse our interest in major shareholdings in IAC Limited at the present time, I should think.

Mr. Baillie: That might be relevant to the committee, yes.

Senator Benidickson: How many shareholders are there in IAC Limited whose shareholdings are in excess of 10 per cent?

Mr. Land: There is only one shareholder in that position, senator, that being Carena-Bancorp which holds something in excess of 19 per cent currently.

We have discussed the situation with that particular shareholder and were urged to attempt to preserve its position on a temporary basis on the grounds that these shares were acquired in good faith and that it is not always convenient to dispose of a shareholding that large in a short period of time. For that reason, we ask in the bill that for a four-year period this shareholder be permitted to vote its shareholding, after which it will not be able to vote any of the shares if it still has a holding in excess of 10 per cent.

Senator Benidickson: Is that corporate shareholder a federally incorporated company? Does it file any reports under federal laws, such as a balance sheet with the Department of Consumer and Corporate Affairs?

Mr. Melloy: It is not a federally incorporated company, but it does have to report, as an insider, on shareholdings in IAC Limited, both to the Department of Consumer and Corporate Affairs and also to the Ontario Securities Commission.

Senator Benedickson: But not under the act I am referring to where anybody could go in and obtain a copy of the last annual statement.

Mr. Baillie: No.

Mr. Melloy: The shareholding company is a public corporation. Some of the shares are owned by the public.

The Chairman: I take it, Mr. Baillie, there is nothing in this bill to prevent a series of ten percenters among the shareholders.

Mr. Baillie: No, there is not, as there is not for the chartered banks. The company has given some consideration, although a decision has not been made, to making a recommendation to its shareholders that it adopt a bylaw which would cut that 10 per cent number down to, say, 8 or 9 per cent. That is a matter on which no decision has yet been reached.

The Chairman: That will be the business of the bank when it gets to it.

Mr Baillie: Yes.

Senator Lang: What nationality would you ascribe to the shareholders?

Mr. Land: I am not quite sure I understand the question.

Senator Lang: I presume Carena is a Canadian corporation. Are the shareholders of that company Canadian?

Mr. Land: We are assured that they are.

Senator Benidickson: Under what jurisdiction was that company shareholder incorporated?

Mr. Land: I believe the province of Quebec, a provincial corporation I think. At one time I believe it was known as the Canadian Arena Company, which is the group that owns the Montreal Forum, the hockey team and so on.

Senator Molson: In recent years.

Mr. Land: In recent years.

Senator Walker: In the meantime, I presume, IAC shares will be traded freely on the stock exchange?

Mr. Baillie: Yes, subjet only to the technical qualification that there will be a requirement prior to registration of the transfer that the transferee establishes Canadian residency, or establishes that the transfer to him does not contravene the Bank Act, similar to the requirements that apply to a purchaser of any bank shares.

I was at clause (12(1)(c) and pointing out that IAC Limited will be required to maintain a list of the holders of 250 or more of its common shares.

Senator Benidickson: IAC maintains the record, but what access to that is there for the public?

Mr. Baillie: Under the BAnk Act that is available. In addition, as I understand it, copies are maintained by the office of the Inspector General of Banks.

Continuing with the technical provisions, clause 12(2) picks out sections of the corporate legislation that would otherwise apply to IAC Limited, being the sections that are equivalent to the sections of the Bank Act that we have previously seen are to be made applicable to IAC Limited. Clause 12(2) says that because those sections of the Bank Act apply, the corresponding sections of the Canada Corporations Act and the Canada Business Corporations Act will not apply.

Clause 12(3) lets us use the Bank Act procedure for adopting bylaws.

Clause 12(4) deals in a similar way with the Investment Companies Act. The federal Investment Companies Act, to which IAC is subject, contains some restrictions on non-resident shareholdings. Since there are corresponding restrictions in the Bank Act sections made applicable to IAC Limited, Clause 12(4) says that those sections of the Investment Companies Act cease to apply to IAC Limited.

Clause 13 says that once this bill becomes law IAC Limited will be subject to the same constraints that apply to chartered banks in the raising of equity capital. It can raise equity capital only by way of rights offerings.

I have had to go through those sections, at the risk of boring the committee, in order to explain the background of the exemptions.

In that contexte, clause 14 speaks of the ownership of shares of subsidiary corporations, and refers to certain subsidiaries, namely two insurance companies, which have been alluded to previously in the committee. The intent of

clause 14 is that IAC Limited would be required to either divest itself of those shares or to bring its holdings in them into compliance with whatever might be permitted to a bank under the Bank Act, within two years after this bill is passed, subject to the right of the Minister of Finance to extend the time for up to a further two years. That provision has some business and overtones, and is one of the provisions that were discussed at some length with the regulatory officials.

Clause 15 again deals with technical questions. The effect of clause 15(1) is to adopt the same two-year requirement, that within two years interlocking directorates with other deposit—taking institutions must be eliminated.

Clause 15(2) again corresponds with the earlier section about interlocking directors within the group prior to the amalgamation, because IAC Limited and the bank will have the same board of directors.

Clause 15(3) recognizes the fact that a Canadian chartered bank is not allowed to have outstanding preferred shares and is not allowed to have outstanding convertible debentures. Because we have made applicable certain sections of the Bank Act to IAC Limited and because IAC Limited currently has outstanding both preferred shares and convertible debentures, an exemption is needed for those securities during the interim period. Subsection (3) embodies that exemption. It, of course, would not carry through past the amalgamation so, in order to amalgamate, IAC Limited will be required to eliminate its preferred shares, unless the Bank Act then permits preferred shares. Also, IAC might be rquired to eliminate the convertible debentures. I will refer to that again in a moment.

Honourable senators, I am taking a few minutes on this, because I think it is worthwhile as background. CLause 15(4) is one to which we alluded a moment ago, that would in effect allow the shareholder of IAC Limited which currently has in excess of 10 per cent of its shares to vote those shares for a period of four years. The effect of the clause would be that after that period of four years it would not be permitted to vote the shares, although it would be permitted to continue to own the shares.

Clause 15(5) is a technical provision that ensures validity of the election. It ensures that nobody will be able to challenge Mr. Land and the other directors and officers as having been duly and validly elected when these new provisions come into effect. That is a very technical provision.

Senator Walker: Do you really need that?

Mr. Baillie: I think so.

Senator Walker: You want to make sure.

Mr. Baillie: Yes.

Clause 16 is very important from the standpoint of IAC. Its effect is to distinguish between businesses that are eligible for a bank and certain businesses, such as the two that Mr. Land referred to a few minutes ago, the leasing and the high ratio mortgage lending business, which would not be eligible for a bank. Clause 16 says that from the day the bill is passed IAC Limited and its other subsidiaries, apart from the bank, may not carry on ineligible businesses except as permitted by this bill, and that from the date the bank starts business they may not carry on eligible businesses except as permitted by this bill.

The background to that is that the expectation is that the bank will carry on any activities of the IAC group which the bank is permitted by law to carry on, and that during the transitional period IAC and its present subsidaries will be permitted, but only to the extend allowed by this bill, to continue to carry on certain activities that would not be eligible for a bank.

We then go to clause 17 to find out what those activities are. It is a complicated clause. In essence it says that IAC Limited and its present subsidiaries must establish two categories. Then they must see what level of eligible business they are carrying on when these restrictions become effective.

The Chairman: You mean "eligible" in terms of the Bank Act?

Mr. Baillie: That is correct, senator Secord, they must ascertain what level of non-eligible business they are carrying on when these restrictions become effective. During the transitional period, until the amalgamation, they may then carry on non-eligible bushes up to that same level. They may acquire eligible assets from the bank. They may not deal directly with the public as to eligible business but they may acquire eligible assets from the bank to keep their eligible business at that same level. It is a highly complicated and highly technical provision, but one which seems to us, and I think to the regulatory authorities, to be a reasonable compromise to deal with a relatively difficult situation.

The Chairman: You mean the order of dealing would be that IAC would acquire eligible assets—that is, assets which are eligible to a bank—only from the bank?

Mr. Baillie: That is correct, senator.

The Chairman: They cannot go on the market.

Mr. Baillie: That is correct, senator; the object, of course, being to ensure that the bank establishes its public identity as quickly as possible.

Senator Connolly: This arises out of the covenants in respect to some of the long-term debt, does it not?

Mr. Baillie: That is one of the reasons we felt it necessary, so that IAC will be able to satisfy its long-term debt covenants, yes.

At the risk of boring the committee, could I refer back to one other provision so I feel I have answered completely the question about exemptions?

You will recall that I asked for permission to come back to clause 10. The reason I did that is because everything I have discussed so far only applies to the period until the amalgamation. Then, clause 10 comes in—it is a complicated clause—and the essence of it is that within ten years the bank and IAC must amalgamate. After ten years, starting at the date of amalgamation, the amalgamated enterprise must be in complete compliance with the Bank Act in all respects. There are only two exceptions made to that. They are found on page 6. Clauses 10(2) and 10(3) which read together with 10(4)—again, in a somewhat complicated way—deal with the situation where there is outstanding on the day of the amalgamation any indebtedness of IAC Limited, that would not be a permissible indebtedness for a bank and which IAC is not able to redeem. That indebtedness may remain outstanding as indebtedness of the bank if, number one, the Minister of Finance consents. The

understanding is we must go to the Minister of Finance and prove to him we have made every effort to try to avoid the necessity of carrying forward the debt. And, number two,—

The Chairman: Just a moment, please. On that point, what happens if the Minister does not approve?

Mr. Baillie: If the minister does not approve, then IAC could be in bad trouble because, if you look at clause 21, that clause states that if the amalgamation does not occur within the ten-year period, the new bank must stop the business of banking.

If the debenture holders refuse to permit their debt to be redeemed, and if the Minister of Finance does not consent to having that debt carried forward into the amalgamated bank, IAC Limited and the bank could be caught in a cleft stick under those provisions. Through the operation of clause 21 serious difficulties could arise.

We have had lengthy discussions about that possibility with the regulatory authorities, and among ourselves. I think it is fair to say that as a business judgment, which perhaps Mr. Land should speak to, our feeling is that this is a business risk which the company should accept in the situation.

Senator Walker: It is a long shot. In the next ten years you surely should be able to accomplish that.

Mr. Land: We are quite confident.

Senator Connolly: Mr. Chairman, is there not another aspect to it also? That is, suppose there are some later maturities after the amalgamation takes place. There is provision here in this clause, as I understand it, that the bank can assume that responsibility, that liability.

The Chairman: Only with the approval of the minister.

Senator Connolly: Yes, of course, with the approval of the minister but the bank can assume that liability, and if its covenant is good, as the prospects are, then the difficulty would be—

The Chairman: You see, the assumption of such a debt would not be permitted for the bank, if it were not provided for in this bill. With the approval of the minister, the bank may assume that liability.

Mr. Baillie: That is correct, senator.

The Chairman: That is why I put the question as to what happens if the minister does not approve. What would appear to happen is trouble.

Senator Connolly: One of the points that perhaps would move the minister to agree to this would be the value of the bank's covenant at the time; and I think the prospects are reasonably good that the covenant will be a good one.

The Chairman: The item you have put on the other side of the ledger, and looking at that, is that at that time the shareholders will be shareholders of IAC. Therefore, it is their problem and their money, plus, of course, the depositor's money.

Senator Walker: You mean, shareholders of the bank?

Senator Connolly: Shareholders of IAC, I think he means, at that point.

The Chairman: Yes.

Mr. Baillie: Senator, if I could comment—this is perhaps a comment Mr. Melloy was going to make—one of the factors which influenced our assessment of these risks is that compared with the total outstanding assets of IAC Limited, the maximum amount of debt that could be involved in this provision is very small.

Perhaps Mr. Melloy should comment.

Mr. Melloy: It would be less than 3 per cent of the total debt outstanding at the present time.

Senator Connolly: Less than 3 per cent of the total debt?

The Chairman: Well, the limitation they have put on this bill is that from the time this bill becomes effective, and the bank is incorporated, IAC cannot make ineligible investments measured in terms of the requirements of the Bank Act. Is that right?

Mr. Baillie: Yes, senator. Of course, that speaks to what you might call the asset side of IAC's balance sheet; that is, what business it can do, what lending activities it can carry on, as opposed to what borrowing activities it can carry on.

The Chairman: Do you mean that in that period it can borrow in a way that it would be ineligible for a bank to do?

Mr. Baillie: It would be permitted to do so, senator, but under the provisions of clause 10, even the Minister of Finance could not consent to having that debt carried forward into the bank. Even the Minister of Finance's power under this bill would extend only to indebtedness that was incurred prior to October 28, 1975, which was the day this bill was introduced.

The Chairman: While you shut that door, the net result is that in the ten-year period IAC may have put itself in a position where it could not amalgamate.

Mr. Baillie: Well, senator, IAC would have no intention of issuing any indebtedness during that period that it could not redeem prior to amalgamation. IAC needs to have the flexibility to borrow because it has already established its borrowing pattern and it just could not legally now borrow in a way the bank could borrow because IAC has to borrow on a secured basis.

The Chairman: This is a matter of judgment of the board of directors of both companies.

Mr. Baillie: Yes, sir.

The Chairman: If they want to prejudice their position, in relation to ultimately putting these two companies together, then this would be one way of doing it.

Mr. Baillie: Yes, senator.

The Chairman: And produce, as you said, bad trouble.

Mr. Baillie: Yes.

Senator Laird: Mr. Chairman, does it not really amount to this: there is a long required period of courtship before marriage?

The Chairman: That could be, yes.

Senator Connolly: Only one is going on the honeymoon though.

Senator Laird: In that connection, Mr. Chairman, might I ask Mr. Paradis a question? I have another question Mr. Paradis, in such a case who enjoys the benefits of the marriage?

The Chairman: Senator Laird, I do not know whether your example is illustrative because you are suggesting a courtship between the directors of IAC and the directors of the bank, who are the same people.

Senator Laird: I had another thought, but I suppose it had better not go on the record!

Senator Walker: Senator Laird was speaking Gaelic; let him speak French!

Senator Benidickson: Mr. Chairman, I want to go back to the clause relating to exemptions that are sought from the provisions of the Bank Act. I am sorry I could not find them before, but I have now found what I want to refer to in Senator Connolly's excellent presentation as sponsor of the bill last Thursday, October 30. On page 1344 of the *Senate Debates* he made the following statement:

> The Bank Act provides that no individual shareholder is entitled to hold more than 10 per cent of the issued shares of the bank. IAC has one shareholder with more than 10 per cent of the issued shares of IAC. Under the provisions of this bill, this shareholder will be given four years to comply with the provisions of the Bank Act.

Then two days later I find my curiosity being aroused, because, bearing in mind that we had mention of IAC in our debates two nights before, suddenly I see a reference to IAC in the *Globe and Mail* in the financial section of November 1, under the heading of "Insider Trading," which is a normal report from the Ontario Securities Commission. The reference to IAC Limited there says that Carena Bancorp Inc. bought 6,600 shares in August and 49,600 shares in September of IAC to hold 2,628,220 shares. My curiosity is aroused. If this shareholder was anticipating the application to convert IAC into a bank, why would it increase by about 2.5 per cent its shareholdings in IAC and then ask leniency from the Bank Act provisions to the extent of asking for four years in order to dispose of those shareholdings?

Mr. Land: Senator, I do not know on what date these transactions took place, but I can say that the shareholder in question was not aware of management's forthcoming suggestion to the board that we pursue the course we are seeking to pursue now. It was actually September 22 before representatives of this shareholder knew anything whatever about our planning. This date applied also to other directors of the company. For a great number of reasons, and quite obvious ones, this was handled in a way that I think was in the best interests of all concerned. It was kept to a limited group until we were ready to present the package in a way we thought would be acceptable. So it could be that some of these shares were acquired before they had any knowledge of this plan. Certainly, they are well aware of the limitation imposed by the Bank Act and what is proposed by way of exemption in terms of the four years' voting rights. This has been discussed at great length with that shareholder. I am not certain that that answers the question, senator.

Senator Benidickson: Of course, I am not particularly knowledgeable in these matters, but I am aware that sometimes a shareholding to the extent of 20 per cent, because of minor holdings by all other shareholders, gives one shareholder a fairly effective voice and control in the corporation. I do not know whether that is the situation here, but, naturally, my curiosity was aroused by this, even as a matter of coincidence. In other words, the day after we have this debate I see a reference to the Ontario Securities Commission being obligated to report certain purchases of shares by the shareholder who now wants four years to have what might be a reasonable and non-pressured sale of the shareholdings to comply with the Bank Act.

Senator Connolly: I should like to ask a question which might be helpful to Senator Benidickson. How did the four-year period develop? I explained it in the Senate according to my lights, but perhaps Mr. Baillie could answer that now.

Mr. Baillie: The only reason I hesitate replying to your question, senator, is that a complete answer would, to a certain extent, get us into the discussion we had with the Inspector General.

Senator Connolly: Well, let me put it this way: I may be wrong, but I understand that a four-year period was given to the City Bank of New York to dispose of shares in excess of 10 per cent, and I understand also that when the Bank Act was last revised and a restriction was placed upon the number of shares which other deposit-taking institutions could hold in a bank, the trust companies, for example, were given four years to reduce their shareholdings to the 10 per cent level or lower. Is that not so?

Mr. Baillie: Perhaps I should just twist that round the other way, senator. The specific provision you are speaking of is one that speaks to the holdings by the banks in other deposit-taking institutions, and the banks were given four years after the last Bank Act revision to dispose of sufficient shares to bring their ownership down to the prescribed Bank Act levels. It is fair to say that that was the provision that was looked to in our discussion with the Inspector General as not a directly relevant provision but one sufficiently relevant to tie it into this bill.

The Chairman: If you had a shareholder with 20 per cent of the outstanding shares of IAC, that shareholder would not be affected by the four-year limitation.

Mr. Baillie: He would be affected, Mr. Chairman, to the extent that at the end of the four years, if he continued to hold over 10 per cent, he would not be permitted thereafter to vote any of his shares.

The Chairman: But he would be permitted to seel them.

Mr. Baillie: Oh, yes.

Senator Walker: This particular shareholder, Mr. Chairman, is not a director, is he?

Mr. Land: Yes. As a matter of fact, there are two directors who are associated with this particular company.

Senator Walker: For the record, what are their names?

Mr. Land: One is Peter Bronfman and the other is Jacques Courtois.

Senator Walker: Since the beginning of September have the shares of IAC gone up in price; and, if so, to what extent?

Mr. Land: Since what date, senator?

Senator Walker: Since the acquiring of these shares by these people.

Mr. Land: I believe that they acquired these shares over rather an extended period of time last year.

Senator Benidickson: Well, Mr. Land, the report in the *Globe and Mail* may be wrong, but somebody must have filed with the Ontario Securities Commission a statement saying that Carena Bancorp Inc. bought 6,600 shares in August and 49,600 shares in September. Either the report is wrong or—

Mr. Land: No, senator, I am not suggesting that the report is wrong. Perhaps I misinterpreted Senator Walker's question. My reference was to the acquisition through the course of last year.

Senator Benidickson: In other words, it may be a longer period than is referred to in this news item.

Mr. Land: No, Senator Benidickson. The figures you have there, I have no doubt, are accurate. But to answer your question with regard to price, Senator Walker, there has not been any significant change either upwards or downwards in the market price of our shares. There are variations of a quarter or an eighth or a half from day to day, or perhaps a dollar over a period of time.

Mr. Melloy: I think the high this year has been 20⅛, and I believe the low was 16⅞. It is a little over 18 now.

Senator Walker: I understand. Then since September, when they were purchased, or August, when the shares were referred to in the *Globe and Mail*, the shares have not significantly risen in price.

Mr. Melloy: No.

The Chairman: Were these persons who were interested in the purchase, at the time of the purchase, directors of IAC?

Mr. Melloy: With regard to the purchase to which Senator Benidickson has referred, they were directors when those shares were purchased, yes.

Senator Walker: Surely these people, with such large holdings, would have beenn consulted early in the game? It is not a game, of course, it is a very serious business. Would they have been consulted about the proposed change-over from IAC to a bank?

Mr. Land: No, sir, they were not consulted in advance of any of our other outside directors.

Senator Walker: I appreciate that, but when did the board of directors, as such, first learn of it?

Mr. Land: As I recall, September 22.

Senator Connolly: This year?

Mr. Land: This year.

The Chairman: A committee of the board had been dealing with it before that?

Mr. Land: Yes. The executive committee of the board, on which these particular shareholders are not represented.

Senator Macnaughton: You have already said you were very careful to keep the whole matter confidential until such time as you made the presentation to the board.

Mr. Land: Yes, senator, until such time as management was convinced that this was a proper recommendation to the board.

Mr. Melloy: There are also, of course, because we are a public corporation, disclosure provisions with regard to any material change, and we were in the position that when we made a recommendation to the board we had to disclose this immediately to the public. A public announcement was made on September 22.

The Chairman: Are there any other questions on that point?

Will you proceed, Mr. Baillie?

Mr. Baillie: I only have one other clause to refer to. I commented on the possibility that the indebtedness of IAC might have to be carried forward into the amalgamated bank. Correspondingly, IAC Limited has outstanding some convertible debentures, which it would not be permissible for a chartered bank to have. The conversion privilege would not be permissible for a chartered bank. Those convertible debentures can be redeemed on or after July 15, 1984. We will be introducing an amendment to this section, because the bill before you speaks of July 14, whereas the actual date should be July 15.

What the clause says is that if the amalgamation takes place prior to that date, and only if it takes place before that date, and again with the Minister of Finance's consent, he can allow that conversion right to remain outstanding as a conversion right of the shares of the bank. However, the exemption would operate only from the date of the amalgamation until July 15, 1984, again in keeping with our theme that the redemption provision must be implemented at the earliest possible date.

The Chairman: The obligation on the convertible debentures is an obligation of IAC. Is that right?

Mr. Baillie: That is right.

The Chairman: And the bank, I would assume, if it has the right to carry on business at that time, could redeem them directly, or indirectly?

Mr. Baillie: Only after July 15, yes, sir.

Senator Walker: There should not be any problem there, should there?

Mr. Baillie: We hope not.

Senator Walker: Do you anticipate any trouble?

Mr. Baillie: No, senator.

The Chairman: Go ahead.

Mr. Baillie: The question I was called on to reply to concerned the exemptions in the bill, and I believe I have covered them all.

The Chairman: Very well. What I would like to do now is this. It is intended to make a number of amendments to this bill arising out of conferences between the petitioners and our acting law clerk. In connection with these amendments, Mr. Baillie or Mr. Land, or perhaps I should say "and/or" Mr. Land, can tell the committee whether these are amendments which they support and would like to see added to the bill by way of amendment. What do you say, Mr. Baillie?

Mr. Baillie: These are amendments we support and would like to see added to the bill by way of amendment, yes.

The Chairman: Mr. Land?

Mr. Land: Yes, sir.

The Chairman: Would you state the general nature of the amendments? How many of them are there that are of substance, and how many of them are what you might call technical changes—for example, a more proper description of references to the Canada Corporations Act, the Canada Business Corporations Act, and the Bank Act?

Mr. Baillie: Senator, in discussions with Mr. du Plessis, we reviewed these changes in detail, and I think I can state that with one exception all of the amendments deal with drafting questions, possibly elevated to the point of substance by, for example, changing July 14, 1984, to July 15, 1984, but nothing more serious than that.

There is one exception, and that is a very technical exception that I would be pleased to comment on if you would like me to do so. It goes a little beyond the drafting area, but apart from that all the changes are in fact in the drafting area.

The Chairman: Yes. Would you discuss the ones that might be called technical, or of substance?

Mr. Baillie: Senator, I am almost embarrassed to take the time of the committee on this one, because, while I think it is a very interesting question, from a legal point of view, it is not one that looms large from a business standpoint.

Perhaps I should sketch out the situation with which we are concerned in this clause. The relevant clause is clause 23 of the bill. The Bank Act prescribes in some detail the procedure for the incorporation and initiation of business of a new bank, and it says, in effect, that after a new bank is organized, the subscribers must put in a substantial amount of capital. At least half a million dollars of that capital must be turned over to the Minister of Finance. After that is done the Governor in Council may give a licence to the bank to commence the business of banking. If that licence is not forthcoming within a year, the bank is not thereafter permitted to do any business. It continues to exist as a corporation, but it is not allowed to do anything.

Clause 23 addresses itself only to the case where that licence is not forthcoming in a year, and it deals with two points.

The clause deals first with the removal from IAC and its subsidiaries of all the various restrictions in this bill, because I think it is fair to say that IAC would be very upset, and everybody involved would be very upset, if, after this bill is passed, for some reason no licence is issued. They would be even more upset if they had to live thereafter with the restrictions in this bill on a continuing basis with neither the bank nor IAC Limited being allowed to do eligible business. So clause 23 says, first, that if that remote contingency occurs, and the licence has not been issued after a year has gone by, the restrictions and provisions applicable to IAC in this bill are thereafter removed.

It says, secondly,—and this is a really remote lawyer's type of concern—what if that money has been paid in? What if that half a million dollars has gone over to the Minister of Finance and more money has been paid into this company? Presumably IAC Limited would like to get that money back, in that remote situation. But there is a technical possibility that if this act were simply to key out at that time, the directors of the bank would be disqualified, IAC Limited would not be able to vote its shares of the bank, and the procedure in the Bank Act to get that money back could not be proceeded with. We therefore concluded, after some review, that clause 23, as worded in the bill, was not really apt to attain the two precise objectives that we wished to attain, without going too far and implying that perhaps we could put even more money into the bank at that time. Therefore, the revised wording of clause 23 is, I think it is fair to say, tailored to attain precisely those two results, namely, removing the restrictions on IAC, in that remote situation, and letting IAC continue to vote its shares in the bank to the extent necessary to get its money back out of the bank.

The Chairman: In using the term "bank" in that connection, you have to remember that if the minister does not give his approval within a year it is not a bank. It has been incorporated as a bank, but it cannot function under the provisions of the Bank Act. It is sitting there with money, though, and how do you get it out? Therefore they want freedom, in connection with their ownership of the shares, and the voting of the shares, without regard to the provisions of the Bank Act. That, of course, seems to be a very reasonable thing, from my point of view.

Senator Walker: You might have an indolent government at that time, 10 years hence. Who knows? It might be delayed by an indolent government, which would be a terrible thing.

The Chairman: Yes. So this is to provide authority for them to deal with the vehicle that was incorporated as a bank, but which cannot carry on the business of banking because the minister has not approved it. Therefore the only thing left to do is to take the substance out of what was a bank or what was incorporated as a bank and return it to the shareholders, and this clause 23 gives them the right to act as shareholders and take all necessary steps in order to distribute that money.

Mr. Baillie: Yes, senator. However, perhaps at the risk of seeming petty. I might comment on Senator Walker's point. This speaks only for the one-year time element, Senator Walker, and not for the ten-year element. There is no corresponding provision which lifts the restrictions on IAC in the event the amalgamation does not go through in ten years.

Senator Walker: There is just the one on the one-year period?

Mr. Baillie: Just the one-year period.

The Chairman: All the other amendments, I take it, Mr. Land, are amendments that you are proposing on behalf of IAC, is that right?

Mr. Land: Yes.

The Chairman: And only two of them involve matters of substance. Is that a correct description?

Mr. Baillie: Yes, that is right.

The Chairman: Does the committee want all these amendments to be read to them or simply to be incorporated in the transcript of proceedings this morning?

Senator Macnaughton: Mr. Chairman, they have been cleared and agreed to by all parties, have they not?

The Chairman: They have been cleared by the parties—that is, by the principals or the petitioners—with the acting law clerk. I have to confess that acting law clerk has spoken to me about them and I do have some familiarity with them as a result of that.

Senator Connolly: What about the Inspector-General of Banks?

The Chairman: The Inspector-General is here, and I was proposing to call him when we were finished with these witnesses. So, is there anything further, Mr. Land, Mr. Melloy or Mr. Paradis, that you would like to add to what you have already said in answer to questions, et cetera?

Mr. Land: No, I would think not. I would simply like to express our appreciation for the opportunity of being here and testifying before the committee.

The Chairman: If I might indulge in a little self-praise, you will appreciate the fact that the committee appeared to be rather knowledgeable.

Mr. Land: Yes.

The Chairman: Do you have anything you would like to add, Mr. Blair?

Mr. Blair: No.

The Chairman: And you Mr. Baillie?

Mr. Baillie: No.

The Chairman: Is there anything you would like to add, Mr. du Plessis, or is there any comment you would like to make?

Mr. du Plessis: No.

The Chairman: I should tell the committee that I have a letter here from Mr. du Plessis in which he says in part:

> With the adoption of these amendments, the bill, in my opinion, would be in proper form and if enacted by Parliament would accomplish the objects of the bill as set out in the petition.

So that clears that hurdle as far as this committee is concerned.

Now, you have an opportunity to ask any further questions you want to ask. Otherwise I shall call on the Inspector-General of Banks.

Senator Lang: Mr. Chairman, there are certain services now being provided for the public by IAC which will be curtailed when this bill is passed, and I think Mr. Land referred earlier to leading of equipment and high ratio mortgage loans. Are those the only two areas that will suffer curtailment?

Mr. Land: I think that is right, senator. If we eliminate the question of the two insurance companies, that would be the curtailment.

Senator Lang: How large a volume does that represent in terms of the total business done by IAC?

Mr. Land: In terms of volume, the leasing is quite substantial. We would have something in the nature of $400 million to $500 million in leasing currently. In the high ratio residential mortgage loans the impact would be much less, and, of course, as a bank, it is quite possible to exceed the 75 per cent advance limitation if the mortgage is insured, so I do not think you can conclude that, as a bank, we would be completely out of that type of business. I do not know if I can add anything to that.

The Chairman: I think on this point—I should refer to a letter addressed to me as chairman of the committee, and I have already told Mr. Baillie about it. It is from the Canadian Federation of Insurance Agents and Brokers Associations and in one part they say that the federation has no objection to the application of IAC to incorporate a chartered bank, but it is concerned only with the insurance implications of any exemption of IAC's subsidiary operations. In that connection they say:

> It would appear the IAC proposal asks for exemption from the provisions of the Bank Act for a limited period of time. Possibly, during that time IAC intends to divest itself of those interests which presently make it ineligible. Federation is concerned that during this interim period the "Bank" would be in a position to influence or positively encourage the placing of insurance though IAC's exclusive agency force. A lender of funds can be quite persuasive in encouraging a borrower to adopt certain business practices as a condition of obtaining a loan. In addition, the IAC application may encourage other financial institutions to seek similar privileges.

This is the point, and I think Mr. Land touched on it. That is to say that during the period that the bank is carrying on business as a bank it may make loans and it may make insured loans, and it may, persuasively or directly, say to the intending borrower, "Well, you place your insurance through one of the subsidiary insurance companies which we control." Now the federation is objecting to that because they think it gives the bank and IAC an unfair advantage.

Have you any comment on that, Mr. Land or Mr. Baillie?

Mr. Land: Mr. Chairman, I believe it is prohibited in one section of the Bank Act for a bank so to act. If I might, with your permission, read subsectin (6) 75, it says:

> (6) No officer or employee of the bank shall act as agent for any insurance company or for any person in the placing of insurance, nor shall the bank exercise pressure upon a borrower to place insurance for the security of the bank in any particular insurance agency, but nothing in this subsection precludes the bank from requiring such insurance to be placed with an insurance company approved by it.

In other words, you cannot make this conditional.

The Chairman: No, I do not believe Mr. Funston's letter suggested that you should make your loan conditional. The word used was "persuasive," and I do not know how you deal with persuasion. How do you prohibit persuasion?

Mr. Land: Senator, I might add that we do not attempt to persuade our customers currently to deal with any specific insurance company if we are talking in terms of insuring chattels, or something of that nature. We do wholly-own Sovereign General Insurance Company, which provides that type of insurance, but we have never made it a stipulation. Nor have we encouraged the customer to go to Sovereign General.

The Chairman: But the question that strikes me is, if you did, so what?

Senator Walker: That would be what Mr. Baillie would call waving the magic wand.

The Chairman: Have you anything to add, Mr. Baillie?

Mr. Baillie: No, I do not think I have. I have to say that that specific section of the Bank Act is not among those that are made applicable to IAC Limited during this interim period. It is true that it will be applicable to the bank, and I think from what Mr. Land said he is indicating an intention to abide by the section in IAC as well as in the bank.

Mr. Melloy: Also, all the eligible business must be written by the bank.

Senator Walker: I do not see how you can do anthing about this; you have to consider it as a business participation and there is no reason why they do this, as I say.

The Chairman: It might be—

Senator Walker: —a boomerang.

The Chairman: It might be discouraging so far as IAC and these insurance companies are concerned. It might in some way relate to their credibility if there were a prohibition, or if these people who are borrowing were told they must not take insurance with subsidiaries of IAC. However, I think we certainly would be exceeding our authority and we might be violating our good common sense.

Senator Walker: I would think so.

Senator Macnaughton: Surely they are entitled to offer insurance, but not insist that it be taken as a condition.

The Chairman: Yes, but all that has to happen under that section of the Bank Act is that an agent or officer of the bank must say, "You get this insurance, or else!" However, certainly the bank would be interested in knowing where the insurance was coming from and they would have to be satisfied that it was good-quality insurance.

Since this was written to me in my capacity as chairman, I thought I should bring it to your attention.

Senator Macnaughton: Mr. Chairman, do you now desire us to make a motion with respect to these amendments?

The Chairman: I thought maybe we would hear the Inspector-General, then we can ask for a motion.

Senator Benidickson: Mr. Chairman, before Mr. Land leaves, I recall that it went through my mind before the debate in this chamber was concluded that I should ask a question as to whether or not IAC Limited or its subsidiaries carry on business subject to the Small Loans Act.

Mr. Land: Yes, we do, senator.

Senator Benidickson: What volume of business do you carry on under the Small Loans Act?

Mr. Land: I have the figure here, senator. Incidentally, that subsidiary which is subject to the Small Loans Act is Niagara Finance Company, a wholly-owned subsidiary.

Senator Benidickson: Yes; I think Senator Connolly explained that.

Mr. Land: In terms of volume or, perhaps, what we use normally is receivables; is that what you wish to hear, senator, or do you mean the actual number of transactions?

Senator Benidickson: The receivables.

Mr. Land: The receivables of Niagara Finance Limited are currently $306 million. However, the proportion of that which is subject to the Small Loans Act is $40 million, out of $306.4 million. The difference is represented by the financing of consumer durables by way of conditional sale contracts and certain other types of loans in excess of the purview of the Small Loans Act and so on.

Senator Benedickson: Of the $40 million, could you give us an estimate of what the average rate of interest received on that would be?

Mr. Land: Yes, I can, sir.

Senator Benidickson: I may say that my memory is not of the best, but some years ago I had quite a fight on my hands when representaing the Minister of Finance. We tried to reduce certain allowable rates of interest under the Small Loans Act. The opposition was not entirely from without the government party. It was rather a tough effort, and I believe it took place in the 1950s. At that time the banks were still subject to a maximum rate of interest of, I believe, six per cent on their loans. It was prior to the time that the banks were permitted to make loans at higher rates of interest under what would be known as personal or consumer loans. Would Mr. Land agree that those later type of bank loans that might be so classified would return a maximum rate of approximately 13 per cent?

Mr. Land: That would be about right, senator.

Senator Benidickson: So that is why I wish to see what your returns would be on loans made under the Small Loan Act, on average.

Mr. Land: Unfortunately, senator, I do not have this with me but I think I can make a reasonably correct guess. If we look at the terms of the Small Loans Act, at the peak I believe that the yield is about 1.27 per cent per month, acturially stated, which is slightly in excess of 15 per cent. The yield on the bottom part of the loan would, of course, be 24 per cent, two per cent a month, at which the rates in the act start. I would guess that in the overall mix of Niagara's business subject to the Small Loans Act the yield would be something in the area of 15 per cent, 14½ per cent, or thereabouts.

Senator Benidickson: So Niagara is competing with the other type of "consumer" or "personal" loans that is now permitted to chartered banks.

Mr. Land: Yes.

Senator Benidickson: And the maximum, we agree, is roughly 13 per cent?

Mr. Land: It varies from bank to bank, as you know, senator, but I think that that is reasonably close.

Senator Benidickson: Are chartered banks permitted to have subsidiaries subject to the Small Loans Act?

Mr. Land: Not to my knowledge; I think it is safe to say, "no."

Senator Benidickson: The thought then arises in my mind as to whether during this transition period you will have two parallel companies in operation, one having business subject to the Small Loans Act and the other a chartered bank, and would be carrying during this period

an option of taking some loans subject to the maximum of about 13 per cent, or alternatively turning that type of business over to Niagara Finance or another subsidiary subject to the Small Loans Act, which could have a maximum rate of interest of two per cent per month.

Mr. Land: Senator, it is anticipated that all new business eligible for a bank will be done in the bank. This is a requirement contained in the bill.

Senator Connolly: That is Clause 9.

Mr. Land: So we would not have that option.

The Chairman: I think we should now hear the Inspector-General and then proceed to deal with the bill and the amendments. Is that in order?

Hon. Senators: Agreed.

The Chairman: Thank you, Mr. Land, Mr. Melloy and Mr. Paradis.

Senator Desruisseaux: Mr. Chairman, I heard Senator Molson's remark this morning. I wish to say that I am in the same boat, and will abstain from voting on this bill. I share the views expressed by Senator Molson as to the advisability of having more banks. That is all I can say.

Senator Benidickson: Mr. Chairman, I am not a member of this committee. I used to be, but I was dropped. I have no animosity toward the creation of this bank. Like Senator Molson, I think that the greater the competition in this field the better. I have no animosity toward IAC or any other group. It is simply that my curiosity was aroused by this particular measure.

The Chairman: I will now call upon Mr. Read. Mr. Read, you are the Inspector-General of Banks. We have been told that the petitioners in the case of this bill have conferred with you in connection with the various provisions and exemptions in the Bank Act. What comment, if any, critical or otherwise, have you in relation to the objects of this bill?

Mr. C. L. Read, Inspector-General of Banks: I have none, Mr. Chairman. Perhaps, as general background, I might comment that it is, of course, stated government policy to encourage competition and to develop new competition in the banking industry through the establishment of new banks. Particularly over the last few years there have been broadening powers of the various financial institutions, a development that was promoted by the report of the royal commission, and, as you know, reflected in subsequent Bank Act legislation and legislation affecting other institutions.

With this broadening and closer competition in the financial system, it is not surprising that an ongoing institution would consider converting to a bank. It is a development which is consistent with the government's objective of encouraging the development of competition in the banking industry.

The IAC has discussed with us its plans, including the principles and procedures which are reflected in the bill. I have no objection or reservation in connection with any of them. I have listened carefully to the explanations which have been made this morning, and I have no questions or problems there.

The Chairman: Even to the extent that we develop the proposed amendments, you have no objection?

Mr. Reid: I have no objection to the amendments. As Mr. Baillie has pointed out, they are primarily of a technical character.

The Chairman: Are there any questions?

Senator Laird: Moreover, it is bound to be successful, because it started in Windsor!

Senator Walker: Mr. Read, did you do a lot of research on this bill? Did you make any amendments yourself, and did you refuse other amendments or amend any amendments? You have made a blank statement that you are in favour of it. How deeply did you go into it? It is a most unusual bill, is it not?

Mr. Read: Yes. There have been very detailed discussions. We have, of course, been conscious that this is the first time that an ongoing financial institution has proposed to convert to a bank. The banking legislation itself does not really contemplate and provide for this. That is why the bill itself is very important, as it is brought to Parliament.

We wanted to be careful about the principles and procedures that are applied in this case, because, as I have said, a situation now exists in the banking system whereby other financial institutions may wish to convert to a bank. So this has to be looked at very carefully, both in the context of the specific proposal, and of the principles and procedures that may tend to develop a precedent for this kind of conversion.

Senator Walker: For approximately how many months have you been considering this bill?

Mr. Reid: Approximately two months.

Senator Walker: You did not take the bill holus bolus as presented to us on first reading? Did you add an amendment or did you take the whole thing as it was?

Mr. Read: The bill was developed after considerable discussion of the principles and procedures involved. I cannot recall that there was anything specific. At their request we went through several drafts with them.

Senator Walker: Thank you.

The Chairman: Are there any further questions?

Senator Benidickson: Could the witness be a little more specific? He said he was approached perhaps two months ago with the knowledge that there was a desire to have IAC sponsor the incorporation of a chartered bank.

Mr. Reid: The IAC had under consideration, through advisers, the question whether they should put before their board a proposal of this nature. Before they agreed to the final form, they wished to discuss the principles and procedures considered desirable at the official level.

The Chairman: That would apply particularly to exemptions from the provisions of the Bank Act, and the proposals in relation to amalgamation?

Mr. Read: That is correct, sir.

The Chairman: Because the amalgamation as proposed here is not specifically provided for in the Bank Act.

Mr. Read: No. The procedures in the Bank Act tend to contemplate the establishment of a newly-established bank.

The Chairman: It also covers the amalgamation of two or more existing banks.

Mr. Read: That is right.

The Chairman: So I take it they wanted their view on these particular provisions, since they were in an area that could be said to be a new procedure; is that right?

Mr. Read: Yes.

The Chairman: Are there any further questions?

Senator Benidickson: Mr. Read, you heard my question with respect to the option in a transitional period for loans to be made, either under the terms of the Bank Act or by a subsidiary of IAC, that would be subject to the Small Loans Act. I was informed that chartered banks cannot make loans beyond about 13 per cent. Do you see any unfairness in chartered banks—in this 10-year period, where another chartered bank would be wholly owned by a company that would have subsidiaries subject to the Small Loans Act—making loans to borrowers at higher rates of interest?

Mr. Read: Not offhand, senator, no.

The Chairman: The proposed amendments deal with clause 7(4)(a); clause 10; clause 11; clause 11(a); clause 12(1); clause 15(1); clause 16(1); clause 17(1), (2) and (3); clause 18(d); clause 19; clause 20 and clause 23—of which we have been told that only the amendments to clauses 7 and 23 might, in some way, get into the category of being non-drafting. All of the other amendments are of a drafting nature. Many of them simply provide the proper description of other statutes that are referred to in the bill.

These amendments will be incorporated in the proceedings of the committee of today's date.

Proposed Amendments to Bill S-30

"*An Act to Incorporate Continental Bank of Canada*"

1. *Page 3*: Clause 7(4)(a)

Strike out lines 38 to 45, inclusive, and substitute therefor the following:

"(a) IAC Limited may, notwithstanding sections 53 and 54 of the Bank Act,

(i) subscribe for shares of the capital stock of the Bank at not less than par value and cause to be registered in the name of IAC Limited the shares issued pursuant to such subscriptions, and

(ii) exercise, in person or by proxy, the voting rights pertaining to shares of the capital stock of the Bank registered in the name of IAC Limited;"

2. *Pages 5 to 7*: Clause 10

Strike out lines 17 to 49, inclusive, on page 5, all of page 6 and lines 1 to 31 on page 7 and substitute the following:

Amalgamation

"10. (1) IAC Limited and the Bank shall, within ten years after the coming into force of this act,

(a) subject to subsection (2), amalgamate in accordance with the *Canada Corporations Act or the Canada Business Corporations Act*, whichever Act applies to IAC Limited at the time of the amalgamation, as if the Bank were a corporation subject to the Act that applies to IAC Limited, or

(b) amalgamate in accordance with sections 100 to 102 of the *Bank Act*, as if IAC Limited were a bank to which that Act applies,

and, subject to subsections (4) to (6), the Bank after the amalgamation is subject in all respects to the Bank Act.

Where *Canada Business Corporations Act* applies

(2) If the *Canada Business Corporations Act* applies to IAC Limited at the time of the amalgamation and if, immediately prior to the amalgamation, IAC Limited owns all of the outstanding shares of the capital stock of the Bank,

(a) subsection 178(1) of that Act applies to the amalgamation, and

(b) the resolutions referred to in paragraph 178(1)(b) of that Act may vary from the requirements set out in that paragraph to the extent necessary to give effect to section 11 of this Act.

Where *Bank Act* applies

(3) Prior to an amalgamation under paragraph (1)(b), the Governor in Council may, by order, prescribe that, notwithstanding subsection 101(2) of the *Bank Act*, the terms of the proposed amalgamation agreement need not be submitted to the shareholders of IAC Limited.

Outstanding indebetedness

(4) Subject to subsection (6), if, when an amalgamation under subsection (1) takes effect, there is outstanding any indebtedness of IAC Limited, other than the debentures referred to in subsection (5), that is of a kind that the Bank is not permitted to incur under the *Bank Act*, Then, notwithstanding the *Bank Act*, any such indebtedness incurred prior to October 28, 1975, remains outstanding after the amalgamation as indebtedness of the Bank and is binding upon and enforceable against the Bank in accordance with its terms, including any terms as to security.

Exercise of Rights of Conversion

(5) Subject to subsection (6), if

(a) an amalgamation under subsection (1) takes effect prior to July 15, 1984, and

(b) on the day when the amalgamation takes effect there are outstanding any debentures that carry rights of conversion into shares of IAC Limited to be issued on such conversion

then, notwithstanding the *Bank Act*, during the period from the day the amalgamation takes effect until July 15, 1984, the rights of conversion under any of those debentures that were issued prior to October 28, 1975 remain outstanding as rights of conversion into shares of the Bank and shares of the Bank may be validly issued during that period upon the exercise of the rights of conversion except that shares of the Bank may not be so issued to a person from whom a subscription for a share of the capital stock of the Bank could not, by reason of paragraphs 53(4)(a) or (b) or subsection 65(2) of the *Bank Act*, be accepted by the Bank.

Application of subsections (4) and (5)

(6) Subsections (4) and (5) apply to any indebtedness and any debentures referred to therein only if

(a) the terms thereof do not permit the debtor, at its option, to discharge the indebtedness or the debentures prior to the amalgamation, whether or not the discharge would require payment by the debtor of a premium or bonus; and

(b) the Minister of Finance consents to the application of those subsections to that indebtedness or those debentures upon submission to the Minister made by IAC Limited that it has attempted to arrive at alternative arrangements that would avoid the necessity of relying upon those subsections as to that indebtedness or those debentures.

Undertaking to discharge indebtedness

(7) The submission referred to in paragraph (6)(b) shall be accompanied by an undertaking to discharge the indebtedness at the first date upon which it may be discharged at the option of the debtor, whether or not upon payment of a premium or bonus.

Discharge of indebtedness and debentures

(8) Any indebtedness referred to in subsection (4) and any debentures referred to in subsection (5) that have not met the conditions set out in subsection (6) shall be discharged prior to an amalgamation under subsection (1).

Effects of amalgamation

(9) For greater certainty, all of the provisions of the *Canada Corporations Act*, the *Canada Business Corporations Act* or the *Bank Act*, as the case may be, relating to the effects of an amalgamation apply to an amalgamation under subsection (1), except as provided in this section and in section 11.

Confirming agreements

(10) The Bank may enter into such agreements as may be reasonably necessary to confirm that any indebtedness to which subsection (4) applies remains outstanding after the amalgamation as indebtedness of the Bank, and that any debentures to which subsection (5) applies are convertible after the amalgamation into shares of the Bank to be issued on such conversion."

3. *Page 7:* Clause 11

Strike out lines 32 to 35, inclusive, and substitute therefor the following:

"The Bank shall be the continuing corporation resulting from the amalgamation of the Bank and IAC Limited referred to in subsection 10(1) so that,"

4. *Page 7:* Clause 11(a)

Strike out lines 41 and 42 and substitute therefor the following:

"mence business when the Bank was originally permitted under that section to commence business."

5. *Page 8:* Clause 12(1)

Strike out lines 16 to 22, inclusive, and substitute therefor the following:

"*Act* apply to IAC Limited and sections 38 to 56 of the *Bank Act* apply to the shares of IAC Limited, and"

6. *Page 10:* Clause 15(1)

Strike out lines 20 to 27, inclusive, and substitute therefor the following:

"15.(1) During the period commencing on the day this Act comes into force and ending on the expiration of two years next following that day or on the day on which an amalgamation under subsection 10(1) takes effect, whichever occurs first, a person referred to in subsection 2(1) is not ineligible, notwithstanding paragraph 18(5)(b) and subsection 18(6) of the *Bank Act*, to be elected or appointed a director of IAC Limited by reason of his being a director of a bank, or of a bank to which the *Quebec Savings Banks Act* applies or of any company referred to in subsection 18(6) of the *Bank Act*, but no person who, but for this subsection, would be ineligible for election or appointment as a director of IAC Limited may hold in IAC Limited any of the offices referred to in section 21 of the *Bank Act* or continue after the expiry of that period to be a director of IAC Limited."

7. *Page 11:* Clause 16(1)

Strike out line 38 and substitute therefor the following:

"is a subsidiary of IAC Limited (any such corporation being hereinafter in this section and in sections 17 to 19 called a "restricted corporation"), to carry on"

8. *Pages 12 and 13:* Clause 17(1)

Strike out lines 22 to 43 on page 12 and lines 1 to 17 on page 13 and substitute therefor the following:

(a) IAC Limited may acquire, and may permit any restricted corporation to acquire,

(i) assets from the Bank previously acquired by the Bank as permitted by the *Bank Act* (such assets and other assets which the Bank is permitted to acquire under the *Bank Act* being hereinafter in this section called "eligible assets"), and

(ii) eligible assets from IAC Limited or any restricted corporation,

but the prior consent of the Inspector General of Banks shall be required for the acquisition of any eligible assets that consist of shares in the capital stock of a corporation, other than a corporation that is a subsidiary of IAC Limited when this Act comes into force;

(b) IAC Limited may acquire, and may permit any restricted corporation to acquire, assets for the purpose of leasing such assets to its customers, and IAC Limited may enter into leases of any such assets and may permit any restricted corporation to enter into leases of any such assets, and

(c) IAC Limited may lend money or make advances, and may permit any restricted corporation to lend money or make advances, upon the security of real or immovable property in Canada or of an equity of redemption therein or of an assignment of or mortgage on the interest of a lessee thereof where such loans or advances would not be permissible for the Bank by reason of the restrictions contained in subsections 75(3) or 75(4) of the *Bank Act* (the said loans and advances, and leases of assets referred to in paragraph (b), being hereinafter in this section referred to as "non-eligible assets"); and

(d) IAC Limited may acquire, and may permit any restricted corporation to acquire, non-eligible assets from any other of those corporations.

9. *Page 13*: Clause 17(2)

Strike out lines 22 to 25, inclsuive, and substitute therefor the following:

"assets held by IAC Limited and every restricted corporation be in excess of the aggregate value,"

10. *Page 13*: Clause 17(3)

Strike out lines 33 to 36, inclusive, and substitute therefor the following:

"gible assets held by IAC Limited and every restricted corporation, excluding those non-eli-"

11. *Page 14*: Clause 18(d)

Strike out lines 23 to 25, inclusive, and substitute therefor the following:

"by IAC Limited or any restricted corporation, in any other of those"

12. *Page 14*: Clause 19

Strike out lines 35 to 37, inclusive, and substitute therefor the following:

"IAC Limited or any restricted corporation is under no obligation to"

13. *Page 14*: Clause 20

Strikes out lines 42 to 45, inclusive, and substitute therefor the following:

"If the Bank or IAC Limited or a director of the Bank or IAC Limited is, in the opinion of the Minister of Finance, in contravention of any requirement of section 8, 9, 12"

14. *Page 15*: Clause 23

Strike out lines 27 to 29, inclusive, and substitute therefor the following:

"tion 15(1) of the *Bank Act* the provisions of this Act that affect or restrict IAC Limited,the subsidiaries of IAC Limited or the shares of IAC Limited shall cease to have effect, except that subparagraph 7(4)(a)(ii) and paragraphs 7(4)(b) and (c) shall remain in effect for purposes of giving effect to subsections 15(2) to (9) of the *Bank Act*."

Is there a motion to amend the bill in these particulars?

Senator Macnaughton: So moved, Mr. Chairman.

The Chairman: Is it agreed?

Hon. Senators: Agreed.

The Chairman: These amendments will be included in the report which will be presented to the Senate later today.

Is there a motion to report the bill with amendment?

Senator Laird: So moved, Mr. Chairman.

Senator Desruisseaux: I want it noted, Mr. Chairman, that I am abstaining.

The Chairman: Yes, I should note that both Senator Molson and Senator Desruisseaux are abstaining from any vote on this bill. They both declared some interest which they might have—

Senator Flynn: For or against?

The Chairman: —outside the range of what we are looking at, and for that reason they chose to abstain from voting. They were entitled, of course, notwithstanding that all these facts were admitted, to participate in the discussions on the bill.

That concludes the meeting.

The meeting adjourned.

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FIRST SESSION—THIRTIETH PARLIAMENT
1974-75

THE SENATE OF CANADA

PROCEEDINGS OF THE

STANDING SENATE COMMITTEE ON

BANKING, TRADE AND COMMERCE

The Honourable SALTER A. HAYDEN, *Chairman*

Issue No. 59

THURSDAY, NOVEMBER 13, 1975

To which was referred *back* the Report on Bill S-30, intituled:

"An Act to incorporate Continental Bank of Canada"

REPORT OF THE COMMITTEE

(Witnesses: See Minutes of Proceedings)

29698—1

THE STANDING SENATE COMMITTEE ON BANKING, TRADE AND COMMERCE

The Honourable Salter A. Hayden, *Chairman*

The Honourable Senators:

Barrow	Hayden
Beaubien	Hays
Buckwold	Laird
Connolly (*Ottawa West*)	Lang
Cook	Macdonald (*Cape Breton*)
Desruisseaux	Macnaughton
Everett	McIlraith
*Flynn	Molson
Gélinas	*Perrault
Haig	Sullivan
	Walker—(19)

**Ex officio* members

(Quorum 5)

Order of Reference

Extract from the Minutes of the Proceedings of the Senate, October 30, 1975.

> "Pursuant to the Order of the Day, the Honourable Senator Connolly, P.C., moved, seconded by the Honourable Senator McIlraith, P.C., that the Bill S-30, intituled: "An Act to incorporate Continental Bank of Canada", be read the second time.
>
> After debate, and—
> The question being put on the motion, it was—
> Resolved in the affirmative.
>
> The Bill was then read the second time.
>
> The Honourable Senator Connolly, P.C., moved, seconded by the Honourable Senator Everett, that the Bill be referred to the Standing Senate Committee on Banking, Trade and Commerce.
>
> The question being put on the motion, it was—
> Resolved in the affirmative."

Robert Fortier,
Clerk of the Senate.

Minutes of Proceedings

Thursday, November 13, 1975
(76)

Pursuant to adjournment and notice the Standing Senate Committee on Banking, Trade and Commerce met this day at 9:30 a.m.

SUBJECT: *Bill S-30—"An Act to incorporate Continental Bank of Canada".*

Present: The Honourable Senators Hayden (*Chairman*), Beaubien, Connolly (*Ottawa West*), Desruisseaux, Flynn, Laird, Lang, Macnaughton, Molson and Walker. (10)

Present, not of the Committee: The Honourable Senator Godfrey. (1)

In Attendance: Mr. R. L. duPlessis, Acting Assistant Law Clerk and Parliamentary Counsel.

WITNESSES:

Continental Illinois National Bank and Trust Company of Chicago:

Mr. Robert O'Boyle, President, Continental Illinois Leasing & Financial Ltd.; and

Mr. Frank G. Felkai, Counsel, of the firm of Blake, Cassels & Graydon, of Toronto.

I.A.C. (Continental Bank of Canada):

Mr. J. S. Land, President, I.A.C. Limited, Toronto; and

Mr. S. F. Melloy, Executive Vice-President, I.A.C. Limited, Toronto.

Following discussion and the questioning of the witnesses, the Committee discussed the proposed name for "Continental Bank of Canada" and it was *Resolved* to report recommending the adoption of their original report on Bill S-30 dated November 6, 1975.

At 10:45 a.m., the Committee proceeded to the next order of business.

ATTEST:

Frank A. Jackson,
Clerk of the Committee.

The Standing Senate Committee on Banking, Trade and Commerce

Evidence

Ottawa, Thursday, November 13, 1975.

The Standing Senate Committee on Banking, Trade and Commerce, to which was referred back for further consideration its report on Bill S-30, to incorporate Continental Bank of Canada, met this day at 9.30 a.m.

Senator Salter A. Hayden (*Chairman*) in the Chair.

The Chairman: Honourable senators, as you will recall, last night the Senate referred back the report of this committee on Bill S-30 for the consideration on one item only, that is, the title by which the bank is to be known. In checking into the question as to why this did not specifically come to our attention earlier, we found that there was an attempt at communication but that the particular people communicated with did not have any responsibility in the matter and that, as a result, it never came before this committee. I did not think we should let that situation lie. Consequently, we have here this morning two people appearing on behalf of the Continental Bank of Illinois, namely Mr. Robert O'Boyle, President of Continental Illinois Leasing and Financial Ltd. and Mr. Frank G. Felkai of the Blake, Cassels and Graydon firm, counsel for the Continental Bank of Illinois.

Subject to what you say, honourable senators, in my opinion we should hear the objectors first and then, if we decide it is necessary to call them, we should hear the petitioners. Is that agreed?

Hon. Senators: Agreed.

The Chairman: Will Mr. O'Boyle and Mr. Felkai come forward, please? Mr. Felkai, I believe you intend to open the presentation.

Mr. Frank G. Felkai, Counsel, Blake, Cassels and Graydon: Yes, thank you, Mr. Chairman. Honourable senators, I appear on behalf of the Continental Illinois National Bank and Trust Company of Chicago. This bank has a Canadian subsidiary, Continental Illinois Leasing and Financial Ltd. The subsidiary is not a bank.

With me this morning I have Mr. Robert O'Boyle who is the President of Continental Illinois Leasing and Financial Ltd. He is a resident of Toronto. Formerly he was senior vice-president of the Continental Illinois National Bank and Trust Company of Chicago.

First of all, I wish to thank you for giving us a hearing this morning. We appear before your committee to present our submission with respect to the proposed name of the new bank, Continental Bank of Canada. Copies of our submission in the two official languages have been distributed this morning. Along with the submissions there are annual reports. I am not sure that we had enough copies of the same annual report, but I think most of you have it. I notified the office of the Inspector General of Banks, the Department of Consumer and Corporate Affairs and the solicitors for ICA Ltd. that there was a possibility of a hearing this morning on this matter.

The Chairman: Yes, I think I instructed you to do that.

Mr. Felkai: Yes, Mr. Chairman, you did. I do not wish to review in detail our submission, but I do wish to point out, as our submission indicates, that the Continental Illinois National Bank carries on the business of banking under the name "Continental Bank" in the U. S. and in 39 other countries. It does not carry on the business of banking in Canada and it does not utilize the name "Continental Bank" in Canada. Indeed, it is prohibited from using that name in Canada by virtue of section 157 of the Bank Act which makes it an offence to use the words "bank", "banker" or "banking" in Canada without being authorized to do so under the Bank Act or another act of Parliament. Thus the name by which Continental Bank, the Illinois bank, is known cannot be protected by registration in Canada.

Briefly, it is our submission that it would not be in the public interest to allow the new bank to use the word "Continental" in the phrase "Continental Bank" in its corporate name. It is our submission that the use of "Continental Bank" in its present context would lead to confusion in the public mind. It would lead to confusion in the international banking community and possibly to confusion in the Canadian financial community.

The particulars of the confusion are outlined in our submission and I only wish to highlight the matter by referring honourable senators first to page 2 of our written submission.

The Chairman: May I interrupt you, please. I think I should read to the committee what the provisions of section 157 of the Bank Act are. It says:

> Every person who, in any language, uses the word "bank", "banker" or "banking", either alone or in combination with other words, or any word or words of import equivalent thereto, to indicate or describe his business in Canada or any part of his business in Canada without being authorized so to do by this or any other Act, is guilty of an offence against this Act.

And then there are penalties provided. So it would be impossible under the provisions of the Bank Act for the Continental Bank of Illinois to carry on business in Canada under that name.

Mr. Felkai: That is correct, yes, sir.

The Chairman: Yes.

Mr. Felkai: On page 2 of our submission, under subparagraph (2), we point out that the bank we represent carries on business under the name "Continental Bank" in the United States and in 39 other countries and that it has a system, as is shown on page 3, of correspondent banks in

those countries, including a correspondent relationship with nine Canadian banks.

I do not wish to review in detail all the paragraphs of the submission, but I wish to highlight some of them. Subparagraph (6) refers to Appendix 1, which is attached to the submission, and Appendix 1 consists of a number of newspaper clippings basically from different countries showing that the bank we represent is known as "Continental Bank" in England, Taiwan, Holland, Kenya, Belgium, Egypt, Italy, Mexico, West Germany and Columbia. That is just a representative sample of newspaper clippings.

Senator Molson: Mr. Chairman, if I may ask the witness a question, when was the name of the bank changed from Continental Illinois Bank to Continental Bank?

Mr. Robert O'Boyle, President, Continental Illinois Leasing and Financial Ltd.: The legal title of the bank has not been changed, senator. The legal title of the bank is Continental Illinois National Bank and Trust Company of Chicago.

Senator Molson: That has not been changed in recent years at all? It is the original name?

Mr. O'Boyle: That is correct, sir.

Mr. Felkai: It carries on business under "Continental Bank," but the full corporate name is the one stated by Mr. O'Boyle.

In Appendix 2 we wish to show that the bank has acquired goodwill and a reputation around the world, and for that purpose we have enclosed copies of advertisements from different economic magazines. The first one, "The Oriental Economist," shows that in Japan the bank is known as "Continental Bank." The next one is also from Japan. The third one shows that in England the bank is known as "The Continental Bank." The next exhibit shows that in West Germany it is known as "The Continental Bank." The next copy is from Belgium and on that it is shown that in a French language advertisement the bank is known as "Continental Bank."

The Chairman: Mr. Felkai, you referred to page 3 of your brief. In paragraph 4 on that page it indicates how your operations in some aspects touch on financial operations in Canada.

Mr. Felkai: Yes, sir.

The Chairman: I think it is important to mention that.

Mr. Felkai: Perhaps I may come back to it in a second. I will just deal with this matter first.

The Chairman: Very well.

Mr. Felkai: Finally, we have included several items which contain copies of advertising material from the United States.

There is a very important document called the International Message, which is used to send remittances in foreign currency around the world, and on that copy you can see that the bank is known as the Continental Bank.

The Continental Bank in the United States is the third largest trader in foreign currency, and Canadian dollar transactions form a major part of that business.

During the last five years Continental Bank was first or second or third in the volume of foreign currency transactions in the United States, and as I explained, it has correspondent relations with many other banks.

Mr. Chairman, you mentioned page 3 of our submission, and the bank's activities in Canada. Sub-paragraph 4 speaks for itself, and it shows that the Continental Illinois Corporation, the holding company, does have interests in Canada.

The Chairman: Yes. I see it has a joint venture with the Royal Trust Company "to engage in construction and development, lending and other interim financing of Canadian real estate, through Builders Financial Co. Limited, and its subsidiaries," etc.

Mr. Felkai: Perhaps some questions might be asked at this point, but I also wish to point out, as I mentioned to you in my introduction, that there could be a possibility of confusion even within Canada, and for that purpose I wish to refer to the fiftieth annual report of IAC Limited issued in 1974. This is not an exhibit. I am sorry, but I did not have enough copies of this particular document. At page 40, the last page, the banks and transfer agents are listed for IAC Limited, and under the heading of "United States" there are several banks named, including the Continental Illinois National Bank and Trust Company of Chicago.

In addition, honourable senators, I wish to refer to another public document. This can be passed around, if you wish.

Senator Laird: Could it not be filed, Mr. Chairman?

Mr. Felkai: It most certainly can. It is the report for 1974 of the Laurentide Financial Corporation Limited, which at page 5, similarly, lists its bankers. First it gives its bankers in Canada, and on page 5 its bankers in the United States. In this document the bank we represent is listed simply as "Continental Bank". This is a Canadian document.

Finally, and this is evidence which has come to my attention only within the last day or so, Continental Bank also participates in the "Mastercharge" program, which is, as you know, similar to Chargex. I was able to obtain only one copy of a Mastercharge card, upon which the only identification is, "Continental Bank."

This is issued in the United States, but of course tourists could bring it into Canada and could use it here. It is accepted now in most Canadian cities. This is a "live" card, but I am happy to make it an exhibit.

The Chairman: I notice in this statement of the Laurentide Financial Corporation, the long form report for 1974, that on page 5 it does indicate banks and lines of credits in the United States. It says, "Continental Bank". Is there any Continental Bank other than the Continental Bank of Illinois operating in the United States?

Mr. Felkai: Yes, sir. I am coming to that. I wish to point out to the committee that there are other corporate entities in the United States known as such.

Senator Macnaughton: In paragraph 4 you seem to be in bed with the Sovereign Mortgage and Insurance Company, which was formed with the Royal Trust, IAC, and Canada Permanent.

Mr. Felkai: That is correct.

Senator Macnaughton: You have 20 per cent of that.

Mr. Felkai: Yes, sir.

I would like to point out to the committee that in our research we did a search of bank names in the United States, and according to the Rand McNally International Bank Directory of 1975, in the United States there are 12 banks which have the words "Continental Bank" in their names, and they are not associated with the bank we represent. These banks are mainly state banks. I wish to point out also that in the United States there are 13 thousand or 14 thousand banks, while in Canada we have a dozen; so the significance of a bank's name is far more relevant and visible in Canada than in the United States.

In the United States the incorporation of banks requires a very different procedure from the procedure used in Canada. It can be done nationally, at the national level, or it can be done practically as of right by the states. There are 50 states, and all of them have different rules. I do wish to bring this matter to the attention of the committee.

I just have a few more points to make, honourable senators.

Senator Desruisseaux: Before you go on, is the Continental Illinois a state bank?

Mr. O'Boyle: It is a national bank, sir.

Mr. Felkai: It is my understanding that IAC Limited did not consult Continental Bank concerning the use of the proposed name. Secondly, the possible loss of good-will to IAC Limited would be minimal, in our submission. It cannot be significant, as the name first appeared in public, as far as we understand, in the *Globe and Mail* on October 6, 1975, some five weeks ago, and this bill had first reading in the Senate on October 28.

I wish to refer to one precedent, honourable senators. This is the application of the then National Commercial Bank of Canada for incorporation in June of 1975, heard by this committee. At that time two interested parties objected to the use of the word "National" in the name. One of these parties was the Banque Canadienne Nationale, and as I understand their submission, they had three objections. Two of the objections had international implications. It was pointed out firstly to the committee that the Banque Canadienne Nationale has branches in Canada, but has agencies in many countries of the world; and secondly, that the Banque Canadienne Nationale uses the Chargex card. Its name appears on the Chargex card and this card is used in many countries of the world.

I do not wish to take any more time. I could deal with questions of law if the honourable senators wish it. It is our submission that there is a likelihood of confusion here. Banking is an international business. It knows no national boundaries. This committee protects the public interest in this sense. It is our submission that the name proposed by the new bank cannot be accepted. Thank you, Mr. Chairman. Mr. O'Boyle and I are ready to answer any questions.

Senator Beaubien: Mr. Chairman, I do not think the name "Continental" belongs to anybody. As I look through this document, I see that all these banks seem to be doing business across the world, and are all called "Continental Illinois National Bank". The fact is that it is known as "the Continental Bank" in lots of places. It could be that in the States, where there is only one bank that is allowed in a state, the bank there is called "The Bank", and that is it. I do not see why there would be any confusion with regard to "Continental Bank of Canada". To me "Continental" is a name which is used in lots and lots of businesses. I do not see that anybody owns the name "Continental", and I cannot see how there could be any confusion if there were a chartered bank here called "Continental Bank of Canada".

Senator Laird: Could I follow the same line of thinking, Mr. Chairman? Probably you may have a memory of this, and perhaps Mr. Felkai may have done some research in this connection. I recall quite some time ago that a company was incorporated here, presumably by act of Parliament, called the "Guaranty Trust Company of Canada", and it is still in existence. At that time there was a financial institution of some considerable importance, I believe, in New York City, which was called, "Guaranty Trust Bank", or some similar name. Now, I am wondering if either you remember, Mr. Chairman, or if Mr. Felkai has done any research which would show this as having caused confusion. All Mr. Felkai has said so far, you see, is that there is a likelihood of confusion. If we had an actual case history it would help us.

The Chairman: Well, of course, I do not know how we could go further than that at this stage, because the bank being created under S-30 is not operating yet, and therefore you cannot test it on the basis of confusion with an existing bank. Rather, the question might be, in view of how the Continental Bank of Illinois operates, is confusion likely to develop? Because on the material before us the Continental Bank of Illinois does have, indirectly, operations in Canada. I am sure it also has a subsidiary company in Canada, incorporated in Ontario. Is the attraction for the people it has joined within Canada because of the subsidiary company or is the attraction because of the parent company, the Continental Bank, and, if there is an attraction, will it make any difference whether this new bank comes into operation under the name "Continental Bank of Canada"? The risk that I see is that in the course of time "Continental Bank of Canada" may begin to be known simply as "Continental Bank" and it will drop the words "of Canada". Will that then be a situation likely to give rise to confusion?

Senator Lang: Is there not another point there, Mr. Chairman? Would a reasonable Canadian who is carrying on business in banking fields in Canada be likely to assume that the Continental Bank of Canada Ltd., was a subsidiary of the Continental Bank of Illinois?

The Chairman: I suppose it is difficult to put yourself into the mind or into the imaginative processes of another person. But there is, I suppose, the possibility.

Mr. Felkai: Mr. Chairman, I was not given a chance to reply to the first question, but what Senator Lang has said would be one of my answers. We would anticipate that at some time there could be confusion in that the new bank could be taken as being a subsidiary of the bank we represent. That is a ground for finding that there could be a likelihood of confusion. Secondly, I wish to point out that the bank we represent has, according to the exhibit, a bank in Belgium called "Continental Bank" and in Bahrein as well.

Senator Walker: But the fact is that as far as Canada is concerned you have no bank with the word "continental" in it, have you? You have no headquarters here and you have no similarity in names so far as any of your institutions are concerned which could be said to be banks? Correct?

Mr. Felkai: Yes.

Senator Walker: How far do you want to extend your claim to that name? You have not, in your wisdom, seen fit to use that name in Canada and yet you have done a great deal of business in Canada, and there has not been any great confusion, apparently. Now why should you, when you are not in Canada, and have no bank with that name in Canada, try to prevent somebody from using it here for the first time? Will you answer that question specifically?

Mr. Felkai: Well, senator, we cannot carry on banking business in Canada by virtue of the Bank Act, section 157, so it is correct to say that we do not have an office which is a bank. The banking business we have referred to with Canadian customers is done in the United States and not in Canada. But our submission is that the banking business cannot be just an isolated national business. By definition it has to be international. So, in a sense, we are pointing out that in the public interest our bank is known very well throughout the world, except in Canada, possibly, but throughout the financial community as the "Continental Bank". Therefore there would be confusion in the international financial community and I think that this committee can take that into consideration. That is one of my submissions.

The other is that banks do tend to go into international banking business and I suspect that the new bank will become well-known in the international community. It was pointed out that the words "of Canada" may well be dropped, and that it would be known simply as "Continental Bank" and that could lead to confusion. It could be thought to be a subsidiary of the American bank.

Senator Walker: Would you like it better if it were called "Canadian Continental Bank"?

Mr. Felkai: I would submit that the danger of confusion is still very great. I think the close association of "Continental Bank", the two words side by side, is what leads to the confusion, and I would submit that "Canadian Continental Bank" would still lead to confusion.

Senator Walker: It would be a great improvement, would it not? How could there be confusion?

Mr. O'Boyle: I would like to comment on that, senator. This is related to a statement made earlier about the possibility of regarding that as a subsidiary or affiliate of the Continental Illinois Bank. We do have a 20 per cent interest in Sovereign Mortgage, and IAC which is going to become "Continental Bank" will have similar holdings until they do something about it. This is a mortgage insurance business. So it is possible—at least in the public mind, if not to sophisticated people who look at the distinctions—that there could easily be a mistake. I would also direct your attention to the fact that size is a factor. We are the seventh largest bank in the United States in total assets.

Senator Walker: What are your total assets?

Mr. O'Boyle: Just under $20 billion as of September 30. We are the largest inland bank in the United States, and we are the largest in the international field of any inland bank in the United States. Largely because of our size and some of the relations we carry on in Canada from Chicago—and, although evidence of most of these things is confidential, it is a matter of public knowledge, as printed in annual reports of financial companies where they list the bank lines—there is evidence of the business we are doing from Chicago with companies in Canada. There are quite a few other major companies in Canada that we transact business with from Chicago. We also have very substantial relationships with all the chartered banks and certainly the five largest and the two French banks, and we have very substantial foreign exchange dealings on a daily basis with them.

Senator Walker: But I would think the ordinary depositor who has never heard of your bank in Canada, because, of course, it is not here with a name like "Continental", would not be deceived in any way at all. The more sophisticated people are not going to be taken in by two names that are somewhat similar. I cannot understand why, because you are a powerful bank in the United States, you have to spread your tentacles up here and say, "No, no, nobody else can have this name in Canada." Where can the confusion be? For the ordinary depositor there is no confusion at all. And the more sophisticated person will know the difference.

The Chairman: Or perhaps he will inquire.

Senator Lang: What possible confusion there is, might arise in the mechanism of banking both nationally and internationally where a relatively unsophisticated bank clearance girl is clearing papers between banks

The Chairman: Of course, that is always a possibility. People dealing with it may not be alert enough; confusion may develop in that sense. I am trying to assess the situation.

Senator Lang: Could the witness answer my question?

The Chairman: The pride of name is understandable.

Senator Lang: Mr. Chairman, could the witness answer my question. I asked a question of the witness but I have not had an answer.

The Chairman: Go ahead.

Mr. O'Boyle: We have had that experience in other places in the world where there are banks with a similar name. We currently have some litigation in Switzerland where there is a continental trade bank which operates as the Continental Bank. Beyond that, there have been instances of mixed up Telex messages, correspondence and remittances. This has resulted in delays and inconvenience to our customers and to the customers of other banks. It certainly is an important factor. We work very hard to educate our clerical personnel to a degree of sophistication, but with the turnover involved it is very difficult. I can visualize that there would be a great deal of such type of confusion and misdirection on the part of clerical personnel in the various financial institutions, including the investment banker.

Senator Desruisseaux: In the United States, how many banks are operating under the name "Continental?"

Mr. O'Boyle: There are twelve other banks that we know of that have the name "Continental." There are three that are national banks. All of them are relatively small. The largest of the banks is in Norristown, Pennsylvania, which has capital and surplus of approximately $44 billion. The next largest bank is in Fort Worth, Texas, which has capital and surplus of $14 million. The third largest is in Salt Lake City, Utah, which has capital and surplus of approximately $7 million.

Those banks are not really engaged to any large degree in international banking, but even with that we do have

some problems from time to time with the bank in Norristown, Pennsylvania. To be specific, we have had instances where remittances have come from Germany to our Continental Bank International in New York with instructions to "remit to your branch or affiliate in Norristown." We do not have an affiliate in Norristown. There is no relationship.

Senator Desruisseaux: You manage very well indeed in any case.

Senator Macnaughton: Has anyone ever checked out the word "continental" vis-à-vis other related uses in Canada? It must be a popular name.

The Chairman: I think we shall hear some evidence from the petitioners about the efforts they made in order to check the possibility of the name being challenged, but that will develop in due course.

Mr. Felkai: If I may assist, we did check and found that there are two previous registrations on the books in the federal department under the name "Continental Bank of Canada." One is an incorporation by Parliament in 1886 of a bank under that name, but I understand it never went into business, never opened an office, never issued any notes. There is also an entry of 1923 showing that the "Continental Bank of Michigan" was licensed by the Province of Ontario to carry on business in Ontario. I am surprised that such a registration was possible. We checked the Ontario file and it shows that the company is inactive, that the word "Michigan" does not appear in the Ontario file. It has been dead-suited. We checked the American bank directories and a bank by the name of "Continental Bank of Michigan" is not known.

Perhaps I could be permitted to answer Senator Walker's question. I think I can deal with it further. You wanted to know why this bank should be entitled to object at this time.

Senator Walker: Excuse me. In your answer would you include the president's assertion that there are 12 banks in the United States, 12 separate entities, using the word "Continental"? We are in Canada and this makes the thirteenth. Would you answer the question including his assertion in your reply and comment on it as counsel?

Mr. Felkai: Yes, sir. I think in my initial submission I did point out that there are 12 others. However, I also pointed out that in the United States there are 13,000 or 14,000 banks as opposed to our dozen. The name of any one bank is far more apparent and visible in Canada than in the United States. Also, in the United States they are far more used to what we call the one-branch baking system as opposed to our nationwide national banking systems.

The Chairman: Senator Walker, I have a question supplementary to yours. I would like to ask Mr. O'Boyle this. If there are, say, 12 banks operating in various states in the United States—under the name "Continental Bank of Texas" or that of other states—and you operate and they operate in the States, what is the risk or fear that a bank incorporated here under the name "Continental Bank of Canada" is more likely to be more competitive and to develop more confusion than those 12 banks that are operating, and I assume have been operating for some years, in the United States?

Mr. O'Boyle: I think it is largely a matter of size and influence. In the United States they are small banks. The proposal of the new Continental Bank of Canada is to incorporate with a capitalization of $100 million. In IAC and the amalgamation they have over $200 million. IAC now has assets of some $2 billion, and I have read in the papers that part of the reason IAC is interested in this is to get the leverage that you can get in banking. From the statements I have read, not initially, but certainly down the road it would be reasonable to assume that their total assets in relation to their capital would be more than twenty to one, which makes it a very sizeable operation. Because it will be sizeable and because we are sizeable, I think this is the principal area where you could get confusion. If it were going to be a small bank up here, I do not think we would be any more concerned than we are concerned with small local, regional, sometimes just city banks. Most of these do not even operate regionally; they operate just locally.

Senator Beaubien: It seems to me that the strongest argument against a Canadian bank using the name "Continental" is simply that perhaps somebody in, say, Switzerland wanting to do business in North America might get confused, and instead of doing business with the American bank in Illinois would start doing business with the Canadian bank in Toronto. That to me seems rather farfetched. I cannot see how anybody in the banking business in Switzerland will get mixed up between the two banks. One of them is an American bank in Illinois and the other is a Canadian bank in Toronto. To me that argument is not very strong with respect to using the name in Canada.

The Chairman: Is it possible that people who have banking business they wish to carry on in Canada are likely to be confused and go to the Continental Bank of Canada to do business, believing it to be the Continental Bank of Illinois?

Senator Walker: When there is no such thing as the Continental Bank of Illinois in Canada. There is no such thing.

Senator Desruisseaux: Is it the intent in the near future to come into Canada and incorporate a bank here as a subsidiary?

Mr. O'Boyle: Under the present Bank Act it is not possible for us to do that, senator.

Mr. Felkai: Senator Walker, if I may point it out, the question of names does not frequently arise, and Parliament can give the bank any name it wishes to, but the question of names does arise in incorporating other companies, of course, and there is some jurisprudence on the matter showing that, on an application to change the name of an existing company, the courts are entitled to consider all the surrounding circumstances; and it is our submission that the circumstances in this instance involve international implications which we ask the committee to consider.

Secondly, Kingston's Canada Corporation Manual, at page 1505, points out that under the Federal Corporations Act a name is protected only if that company is a business which is being carried on in Canada, and I quote:

> However, the Department—

that is, the federal department—

> would not approve a name similar to that under which a business was being carried on abroad—e.g., in the United States or in Great Britain—and which was well known in Canada. Thus, letters patent undoubtedly

would be refused to incoporate Macy's Limited, or Sears-Roebuck Limited.

And it is our submission, sir, that in this instance we are dealing with a fairly well-defined public, in addition to the public at large with the business community in banking, and in that community "Continental Bank" as such is well known. It is our submission that for that reason confusion is likely to arise.

The Chairman: Mr. Felkai, to go that far we would have to assume that the bank being created under Bill S-30 is being created with this name for the purpose of riding on the tails of the Continental Bank of Illinois. It strikes me that way.

Senator Walker: Quite so.

Senator Laird: Mr. Chairman, in another field of commercial activity, may I call to your attention something you may not know but which I experienced. In southwestern Ontario there were at least two attempts that I know of to use in connection with retail operations the name of "Hudson". Hudsons's store in Detroit is extremely well known to Canadians in southwestern Ontario, who have been known to buy things there and smuggle them back. For example, I even had a case myself involving—

Senator Molson: A case of smuggling?

Senator Laird: I would never smuggle, of course.

The Chairman: You mean for a client.

Senator Laird: Yes. I went for my wife. In any event, I had a case where a man wanted to incorporate in Ontario under the name of "Hudson's Ready-to-Wear Limited." In line with one observation of Mr. Felkai's, the provincial secretary turned down the name on the ground that Hudson's had goodwill in at least southwestern Ontario. I am unaware whether you knew that or not, but I just point it out for further discussion.

Senator Walker: Mr. Felkai, could you answer the Chairman's distinction, which is a real one. You are talking about Macy's, which is a householf word. Every woman knows that word. But when you talk about a sophisticated field of banking, you have to admit that nobody in the ordinary public has ever heard of Continental. This is a sophisticated area in which you are suggesting the confusion must arise. But the confusion will not arise among sophisticated people or between bankers. So I do not think that the analogies you have given us are of much help.

The Chairman: Senator Walker, there is the additional factor of size. Mr. O'Boyle has stressed the bigness of this Continental Bank of Illinois and the lack of confusion, and so on, in relation to other banks bearing the name in the United States because they were just small banks.

The bigness of a bank, it strikes me, is designed to attract big business, not the simple depositors. The simple depositor may be a necessary and valuable adjunct, but to stress the bigness of a bank is really to indicate the attractiveness it has for doing business with big corporations in large sums of money.

If we apply that to the particular case before us, the Continental Bank of Illinois has about $19 billion of assets, whereas the bank we are proposing to incorporate might have a capital of $100 million when it finally becomes operational. Are they likely to meet in the same financial areas? If they do, so far as the Continental Bank of Illinois is concerned, it would have to find some intermediary through which it could operate in Canada because it cannot carry on banking business itself in Canada. That to me seems rather significant.

Senator Walker: It has not chosen even to try to do so up to the moment, has it?

The Chairman: It might have problems applying for a charter for a Canadian bank. I do not know. But we have restrictions on ownerships of shares and things of that kind by non-residents in order to restrict the intrusion of substantial non-resident interests into the Canadian banking system.

Senator Macnaughton: Mr. Chairman, the Continental Illinois Corporation has a subsidiary in Ontario which was incorporated in 1973, Continental Illinois Leasing and Financial Ltd. How large and how well known is that subsidiary? It only started in 1973.

Mr. Felkai: Senator Macnaughton, we only mentioned that subsidiary in order to make full disclosure to the committee as to the bank's presence, through a subsidiary, in Canada, but the subsidiary is not doing banking business. Mr. O'Boyle can deal with the size of the subsidiary, if you like.

Mr. O'Boyle: Senator Macnaughton, we areincorporated with a capitalization of $5 million. We have the guarantee of our parent Continental Illinois Corporation to support us in the commercial paper market and in selling our commercial paper, guaranteed for $100 million in short term paper, and $50 million for longer term items over 270 days. Our development has been satisfactory. Actually, we are not approaching those limits, which are in support, but we are not restricted to them either. They are simply figures which seemed attainable in the first brief few years of operation.

Senator Macnaughton: I was really thinking of the publicity angle of this, and the possible confusion with the proposed new bank.

The Chairman: Any other questions?

Senator Flynn: I was wondering whether the witness would be able to say whether the word "Continental", as associated with banks, is used in other areas of the world outside the United States. It seems to me that I have seen that name all around the world.

Mr. O'Boyle: There are several "Continental Banks" around the world. We have had problems with some of them in the area of confusion. I do not mean banking problems as such. There are no major banks with that name in the international banking field that I know of.

Senator Flynn: But would you not agree that it would be a safeguard for you, as far as the proposed bank is concerned, rather than that the name of the new bank would be a problem to you? I would suggest that the new bank is more likely to suffer from the fact that you have its name, than the other way around.

Mr. O'Boyle: Well, senator, that might well be the case in the international business field. I really cannot be sure of that. I think the very real problem, and the one we are most concerned about, is the confusion that could arise as a result of the similarity of names. We have rather a long name, and yet, commonly, we have been called "Continental Bank", wherever we operate, even though the title is,

"Continental Illinois National Bank and Trust Company". I am sure that after a relatively short time, the Continental Bank of Canada will be called, "The Continental Bank".

The Chairman: Any other questions?

Senator Desruisseaux: On page 3 of the brief, paragraph (4), in the second sub-paragraph, you say:

> Earlier this year, Continental Illinois Leasing & Financial Ltd. formed CI Capital (Canada) Ltd., a Canadian Subsidiary, to engage in mortgage lending in Canada.

What does "CI" stand for?

Mr. O'Boyle: "Continental Illinois".

The Chairman: Any other questions?

Well, Mr. Felkai, have you anything more to add?

Mr. Felkai: The only thing I wish to add, Senator Hayden, in response to Senator Walker's question, is that this committee does oversee the operations of banks in Canada, in its wisdom, and it is our submission that they should be protecting the public interest in this instance, and that we cannot look at banks in isolation. They do international business. We wish also to point out the heavy international involvement of Continental Bank. I have no further submission.

The Chairman: Thank you.

Mr. O'Boyle: Mr. Chairman, if I might, I would like to add my thanks to you and to the senators for giving us an opportunity to be heard here. As we indicate in our submission, we have no objections whatsoever, indeed, we do not think it would even be proper for us to object, to IAC becoming a bank. As a matter of fact, we would support them, to the degree that they wanted our support, in their efforts. We have known its management for many years, and we think highly of them. They are highly capable, and they will add an element of competition to banking in Canada. On behalf of Continental Bank we certainly wish them well if they get their charter to operate.

The Chairman: Thank you. Now shall we hear Mr. Land. Mr. Land is the president of IAC.

Mr. J. S. Land, President, IAC Limited, Toronto: Mr. Chairman, Mr. Melloy will be associated with me, with your permission.

The Chairman: Yes.

Honourable senators, you have already met Mr. Land and Mr. Melloy. You have heard the statements made by the previous witnesses also.

Mr. Land, what have you to tell us about the steps you may have taken in settling on this name, "The Continental Bank of Canada"?

Mr. Land: Mr. Chairman, I would like to outline briefly for the honourable senators the considerations that were involved in our final choice of the name, "Continental Bank of Canada".

First of all, considerable effort was made by officers of IAC Limited to come up with a selection of names which appeared to be appropriate and desirable for the new bank. Out of this study emerged a list of approximately 50 different names, which were submitted to the board of directors of IAC Limited for their consideration.

There were certain basic beliefs that we had in connection with the final selection of the name, but there were actually three really fundamental ones.

The first of these was that we knew we must avoid choosing a name which would conflict with that of any other Canadian deposit-taking institution, either in existence currently, or which might have been in existence at some time in the past. The list of chartered banks alone ruled out such words as "Commerce", "Commercial", "National", "Provincial", "Royal", "City", "Mercantile", and others. We then turned to the trust companies. The same consideration eliminated such words as "Eastern", "Investors", "Central", "Ontario", "Canada", "Premier", "Sterling", "Metropolitan", and so on. Therefore our choice from the original list of 50 was somewhat limited.

Secondly, we wanted a name which would distinguish the operating plans of the proposed bank from those outlined by other recently chartered banks in Canada. It is my understanding that some of these banks propose to operate on a somewhat regional basis, as opposed to our plan, which is to operate in all the provinces of Canada and in the Territories, where IAC itself currently operates in over 200 locations. The word "Continental" seemed to us to convey the concept of a bank operating on this scale.

The third consideration was that IAC, for many years, has operated in both official languages; in fact, 20 to 25 per cent of IAC's business is conducted in the French language. The name had therefore to be one which was readily translatable, and which conveyed precisely the same connotation in both French and English. In this respect the word "Continental" was ideal, because the addition of the letter "e" to the English word "Continental" created the French version, and it had precisely the same meaning in each language.

For these and other reasons of lesser importance the Board of directors of IAC Limited unanimously approved the choice of the name "Continental" Bank of Canada".

Carrying this a step further, we then consulted with the Inspector General of banks, who had no objection to our use of the name "Continental Bank of Canada". It is my understanding that the Inspector General took the precaution of consulting with the Department of Consumer and Corporate Affairs on the name "Continental Bank of Canada", and that department had no objection either.

We examined possible conflicts with other Canadian financial type organizations which might not come under the heading of either banks or trust companies, and we were unable to find any other conflict there. Having done this we felt quite sure that we could proceed on the assumption that we could use, without objection, "Continental Bank of Canada". I would respectfully submit, honourable senators, that it would have been a virtually impossible task to consult with 12,000 or 14,000 banks in the United States to see whether we could use "Continental Bank of Canada" or not, when the word "continental", as has already been stated by the previous witness, is used by 12 or 13 different banks right in the United States. We were very much aware of the "Continental Illinois Bank" and our regard for that institution is indeed high. We have had customer relations with them and we are associated with them, as you have heard, in a small enterprise. But we just could not see that there could be any conflict between a bank, the proper name of which is "Continental Illinois National Bank and Trust Company of Chicago" and "Continental Bank of Canada". I would respectfully submit to honourable senators that possibly the reason for the confu-

sion which we are being told exists in the international area as a result of the use of the word "continental" by more than one organization might emerge from the fact that the Continental Illinois Corporation, the holding company of Continental Illinois National Bank and Trust Company of Chicago has, of its own choice, chosen to use "Continental Bank" which is not its official name. So we did not anticipate any objection to this and received no indication of it until we had published our notification in the paper of our intention to petition Parliament for a charter by way of Bill S-30. Bank names are difficult things to come up with, honourable senators. I would not even hazard a guess as to how many first national banks there are in the United States. I can name a few right offhand: First National City Bank, First National Chicago, First National of Bostom, and one can go on and on and on. When you are dealing with 12,000 or 14,000 banks you are bound to come up with some possibility of confusion. But we do not propose to call the bank which we are seeking to charter "Continental Bank"; we propose to call it "Continental Bank of Canada". I can assure honourable senators that we have no intention of riding on the coat-tails of Continental Illinois National Bank and Trust Company of Chicago, or its Canadian financial services company, Continental Illinois Leasing and Financing Company Ltd. That to me does not sound very much like "Continental Bank of Canada" either.

The Chairman: If the practice of using letters of the alphabet which has become so common were to apply you might become CBOC, and you might particularly be embarrassed td be identified with the letters CB.I

Senator Laird: I have another suggestion. Why not call it the Land Bank?

Mr. Land: I think there are some banks in Germany who might dispute our right to use that name. I gather there are a number of banks who use that name there. I could also submit, honourable senators, that inevitably you can anticipate things that might happen. For example, we have here in Canada a bank, our largest bank, with the name The Royal Bank of Canada and there is also a Royal Bank of Scotland.

Senator Desruisseaux: There is also one in New York.

Mr. Land: So, Mr. Chairman, we feel that we have done all we could reasonably be expected to do before selecting this name.

The Chairman: Any questions?

Senator Beaubien: Has IAC made any arrangements to issue credit cards?

Mr. Land: No, sir.

Senator Flynn: In other words, IAC is willing to take a risk of confusion with the big Illinois corporation?

Mr. Land: We are, sir. It does not concern us at all.

The Chairman: Any other questions?

Thank you very much, Mr. Land and Mr. Melloy.

Honourable senators, our task here this morning was to consider the propriety of the name in view of the reference of this report back to the committee to study and to report on only the propriety of the name.

Is there any proposal by way of amendment to change the name of this bank in this bill? I have not received any indication of one. The question would appear to be whether, in view of the question that was referred to us as to whether the name in all the circumstances is a proper name in the sense that it is not confusing and is not designed for competitive purposes such as passing off, or things of that nature, it would be the general intent of the committee to report that they have considered the question, that they have heard the witnesses objecting and the petitioners and they have concluded that the name is a satisfactory name from the point of view of confusion. I think the kind of motion we should make would properly be to incorporate both the earlier report and this report in a single report which would state that we have re-examined our previous report, that we have heard additional witnesses on the one point referred to us, and that we recommend the adoption of the entire report to the Senate.

Senator Beaubien: I would move that, Mr. Chairman.

Senator Walker: Seconded.

The Chairman: Those in favour?

Contrary, if any?

Carried.

Senator Desruisseaux: Mr. Chairman, I am abstaining from that vote for the same reasons that I have given before.

Senator Molson: Mr. Chairman, I should like to have it recorded that I am also abstaining from voting.

The Chairman: We have not quite settled what the form of the report will be, but I think we will incorporate the substance of the earlier report and then add another paragraph dealing with this further hearing today, our consideration of it and our conclusion.

Senator Flynn: Mr. Chairman, if the form of the report is in your hands, then it is in good hands.

The committee adjourned.

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FIRST SESSION—THIRTIETH PARLIAMENT
1974-75

THE SENATE OF CANADA

PROCEEDINGS OF THE
STANDING SENATE COMMITTEE ON

BANKING, TRADE AND COMMERCE

The Honourable SALTER A. HAYDEN, *Chairman*

Issue No. 60

THURSDAY, NOVEMBER 13, 1975

Second Proceedings on Bill C-2, intituled:

"An Act to amend the Combines Investigation Act and The Bank Act and to repeal an Act to amend an Act to amend the Combines Investigation Act and the Criminal Code"

(Witnesses: See Minutes of Proceedings)

29700—1

THE STANDING SENATE COMMITTEE ON BANKING, TRADE AND COMMERCE

The Honourable Salter A. Hayden, *Chairman*

The Honourable Senators:

Barrow	Hayden
Beaubien	Hays
Buckwold	Laird
Connolly (*Ottawa West*)	Lang
Cook	Macdonald (*Cape Breton*)
Desruisseaux	Macnaughton
Everett	McIlraith
*Flynn	Molson
Gélinas	*Perrault
Haig	Sullivan
	Walker—(19)

**Ex officio* members

(Quorum 5)

Order of Reference

Extract from the Minutes of the Proceedings of the Senate, October 28, 1975:

> "Pursuant to the Order of the Day, the Senate resumed the debate on the motion of the Honourable Senator Cook, seconded by the Honourable Senator Paterson, for the second reading of the Bill C-2, intituled: "An Act to amend the Combines Investigation Act and the Bank Act and to repeal an Act to amend an Act to amend the Combines Investigation Act and the Criminal Code".
>
> After debate, and—
> The question being put on the motion, it was—
> Resolved in the affirmative.
>
> The Bill was then read the second time.
>
> The Honourable Senator Cook moved, seconded by the Honourable Senator Burchill, that the Bill be referred to the Standing Senate Committee on Banking, Trade and Commerce.
>
> The question being put on the motion, it was—
> Resolved in the affirmative."

Robert Fortier,
Clerk of the Senate.

Minutes of Proceedings

Thursday, November 13, 1975
(78)

Pursuant to adjournment and notice the Standing Senate Committee on Banking, Trade and Commerce met this day at 2:30 p.m.

SUBJECT: *Bill C-2—"An Act to amend the Combines Investigation Act and The Bank Act and to Repeal an Act to amend an Act to amend the Combines Investigation Act and the Criminal Code".*

Present: The Honourable Senators Hayden (*Chairman*), Beaubien, Connolly (*Ottawa West*), Cook, Desruisseaux, Flynn, Laird, Lang, Macnaughton, Molson and Walker. (11)

Present, not of the Committee: The Honourable Senators Benidickson, Denis and Lawson. (3)

In Attendance: Messrs. R. J. Cowling and J. F. Lewis, Advisors to the Committee.

WITNESSES:

Dept. of Consumer and Corporate Affairs:

The Hon. André Ouellet, P.C., Minister; and

Mr. Robert J. Bertrand, Assistant Deputy Minister and Director of Investigation and Research.

The Committee, together with the witnesses, proceeded to the discussion of the said Bill as passed by the House of Commons.

Following the discussion, it was *Agreed* that Mr. Ouellet appear again Wednesday next, November 26, 1975, at 9:30 a.m.

At 4:00 p.m., the Committee adjourned to the call of the Chairman.

ATTEST:

Frank A. Jackson,
Clerk of the Committee.

The Standing Senate Committee on Banking, Trade and Commerce

Evidence

Ottawa, Thursday, November 13, 1975.

The Standing Senate Committee on Banking, Trade and Commerce, to which was referred Bill C-2, to amend the Combines Investigation Act and the Bank Act and to repeal an Act to amend an Act to amend the Combines Investigation Act and the Criminal Code, met this day at 2.15 p.m. to give further consideration to the bill.

Senator Salter A. Hayden (*Chairman*) in the Chair.

The Chairman: Honourable senators, I have indicated to the minister that we will sit until 4 o'clock today, because the committee will deal with this bill again next week. Possibly next Wednesday afternoon would suit your purpose rather than the morning. There is another bill that we could deal with on Wednesday morning.

Since the bill before us is a public bill and is in our hands from the Senate in a formal way, it is at the top of our list and must be disposed of promptly. Whether we have any interference with the rapid disposition of the bill may well depend on circumstances. I am sure you understand, Mr. Minister, as well as I do that, that depends on our views as to what changes, if any, should be made, and on your views as to what changes, if any, you are prepared to concede. That is the spirit in which we have invited you here. We will tell you those problems that bother us and will ask for an explanation.

The first item to be dealt with is the one that developed after we had studied the bill—namely, the question of fines and the changes that were made in the Commons. Would you please proceed, Mr. Cowling?

Mr. R. J. Cowling, Legal Adviser to the Committee: Yes, Mr. Chairman. The difficulty seems to be, Mr. Minister, that penalties are now prescribed in three different ways in the bill. With respect to some offences, a fine of a specified amount is prescribed. An example of that is to be found in subsection 32(1) on page 24.

Another example is a fine not exceeding a specified amount, an example of which would be section 37.1, subsection (2), to be found on page 37.

A third is a fine at the discretion of the court, an example of which is to be found in paragraph 36(5)(a) on page 32.

The point has been raised that because of the different methods of describing the penalties, a court might be obliged to conclude, with respect to section 32(1), where we do not find the words "not exceeding", nor do not find a discretion—I think the fine prescribed there is $1 million—that it did not have discretion in that particular case, that the only fine it could impose was one of $1 million, because in other sections we find this specific wording, and on the general rules of statutory interpretation, where there is a specific provision in one place and not in another, that is the conclusion you come to. We were wondering whether you had any comment on that.

The Honourable André Ouellet, Minister of Consumer and Corporate Affairs: The first comment I should like to make is that one has to make a distinction between summary conviction cases and those dealt with by way of indictment. That is why in some areas the amount of the fine specified and in other areas, as you have quite clearly pointed out, the amount is not specified. Those cases where it is left to the discretion of the court are where the offence is dealt with by way of indictment, and where the case is dealt with by summary conviction the amount of the fine is specified. I forget for the moment the particular section of the Criminal Code involved, but—

The Chairman: Section 645(2).

Hon. Mr. Ouellet: That is the section that states that in these cases the court could impose a fine, a term of imprisonment, or both.

During the report stage in the other place, a member of the loyal Opposition, Mr. Lambert, wanted clarification in the bill that would quite clearly specify that there is in fact a discretion with the court to go one way or the other with respect to the fine or imprisonment. He felt that should be made clear in the legislation for the benefit of those people who were not too familiar with the Criminal Code and who would not be aware that when only a jail sentence is indicated, it does not automatically mean that a jail sentence would be imposed, but that the court would still have a discretion to impose either a jail sentence, or a fine, or both.

Mr. Cowling: I believe he was referring to section 646(1) of the Criminal Code in that respect. That section states that even though a jail sentence is prescribed, the court may prescribe a fine.

The other section is section 645(2) which says that where an enactment prescribes a punishment in respect of an offence, the punishment to be imposed is, subject to the limitations prescribed in the enactment, in the discretion of the court.

That is another point, I think. That says that where a fine has been prescribed—that is to say, where a specific amount is mentioned—nothwithstanding that, the court has the discretion to impose a lower fine, and I understand that this is how the whole subject of the amendments and the subamendments in the House of Commons came up. I do not think we are commenting at all on the substance of the amendments. It is simply that the subamendment, possibly, was not made in sufficient places in the bill, particularly section 32.1, and that a court might conclude that because of the wording in the other sections, a fine of $1 million was mandatory in all cases.

Hon. Mr. Ouellet: I do not think it is mandatory. If you look at the top of page 24, it says, "... is guilty of an indictable offence and is liable to imprisonment for five years, or a fine of one million dollars, or both."

The Chairman: It is a fine of $1 million.

Hon. Mr. Ouellet: It could go up to that.

The Chairman: It is a specific amount.

Hon. Mr. Ouellet: It is "up to."

Mr. Cowling: That is the very point. It is a very technical point, Mr. Minister. In other places in the bill you have the words "not exceeding $5,000," or whatever the fine might be. Now, why does the legislation use the words "not exceeding" in both those cases and not on page 24? That is the point.

Hon. Mr. Ouellet: I understand. I think you will appreciate that some of these amendments were made in committee. Some of the amendments which we accepted did not come from the official draftsmen of the Department of Justice, but rather were amendments brought down by the committee itself. Therefore, there might have been at one time some inconsistencies in the actual wording. At any rate, I believe those inconsistencies have been cleared up.

Do you have an example of where such an inconsistency still exists?

Mr. Cowling: Yes, I think that perhaps section 32.1 on page 34 is the only place where the words "not exceeding" do not appear, or the words "in the discretion of the court."

Hon. Mr. Ouellet: No, I do not think so. Which other one do you have in mind where the words "not exceeding" are not used?

Mr. Cowling: On page 37, Mr. Minister, the penalty with respect to sale above advertised price, which is section 37.1(2). In that case you have the words "not exceeding $25,000."

Hon. Mr. Ouellet: There again, going back to the first explanation I gave you, in respect of offences dealt with by way of summary conviction you will find the expression, "liable to a fine not exceeding" and then a certain amount, but you will not find that wording in areas where the offence is dealt with by way of indictment.

The Chairman: The point is, if it is intended to be a fine of up to $1 million, then it should be clearly stated. Otherwise, it results in confusion as against the provisions of the Criminal Code. Which way is the judge going to jump in the event of such confusion? Is he going to conclude that because you have used these various expressions to describe the amount of the fine that it is the intention to nullify section 645 of the Criminal Code? It is quite possible that he would so conclude.

Hon. Mr. Ouellet: Perhaps, except that the sections say that the person or firm who is guilty of an indictable offence is liable to imprisonment for five years. That is the wording.

The Chairman: But that does not deal with the fines.

Hon. Mr. Ouellet: But if the judge gives judgment one way in respect of the imprisonment and another way in respect of a fine, there would be some inconsistency in his own mind. I believe that the judiciary are clearly aware that when we have in legislation "imprisonment for five years," that does not automatically result in a five year sentence; rather, that there is a discretion. When we say that there is to be a fine of $1 million, he has the same discretion to make the fine any amount he wishes.

The Chairman: Well then, Mr. Minister, if that is what is intended, why should we not say so?

Hon. Mr. Ouellet: Because of the way the Criminal Code is written, Mr. Chairman, and I do not believe that you will find that type of wording in other parts of the bill which deal with indictable offences.

Mr. Cowling: That could be so. I am not certain. Even so, I wonder if that will be a factor in the judge's mind. I think that he could conclude, whether it was prescribed for an indictable offence or a summary conviction offence, the fact that the words "not exceeding" were used in some cases and not in others, would indicate that the legislature had intended by implication to amend the Criminal Code provisions which otherwise would have given him the discretion. It is not a certainty that the judge would so conclude, but it is a possibility.

I think that the reason the Mr. Lambert's amendment met with such general acceptance in the House of Commons was for the very reason that although there was a section in the Criminal Code which accomplished the same thing as his amendment, it was desired to draw the attention, shall we say, of the judge to the fact that he did have these options. On the same kind of reasoning I would say there might be difficulties with this present problem that you are talking about.

Hon. Mr. Ouellet: I do not quarrel at all with your view. I quite accept that we have to be as clear as possible. The way I read the clause, the judge, if he is embarrassed about the penalty, could always revert exclusively to imprisonment. He has three ways to go about it. He could go for imprisonment, he could go for a fine, or he could go for both.

The Chairman: But his opinion might be, "This is not the type of case where I should give a prison term; the ends of justice would be satisfied by a fine."

When I look at what you and Mr. Lambert said in the House of Commons when you were dealing with this amendment, I say to myself, "Why should we not reflect in this bill the explanation which you gave in the house?"

Senator Walker: That is what you said, Mr. Minister, but it is not your fault. In your speech you were, we think, correct, but it has not been included here. In other words, one clause of the bill is a contradiction of the other, and a judge, reading this, where he has no alternative but to give them a million dollar fine, or a five-year term of imprisonment, has to do that, because another part of the bill, where he does not have to give the maximum, specifically says so. That is what you said in your speech. In other words, there is a contradiction in the amendments that have been made to this legislation, which has nothing to do with you. If your speech had been adhered to, there would not be this contradiction. Am I right, Mr. Chairman?

The Chairman: Yes. The Minister and Mr. Lambert, according to *House of Commons Debates*, October 15, at pages 8232 to 8238, said that Parliament intended to impose a maximum only, and did not intend to affect the discretion of the court to impose a lesser fine, and in all probabil-

ity no court would conclude that Parliament intended to take away the discretion of the court.

However, my comment on that would be that it would be desirable to eliminate any possible doubt. This is a serious matter, whether it is a fine of $1 million or a fine of $750,000, and therefore we feel that we should harmonize this provision in the bill with other sections of it where you have used the words "up to" or "not exceeding." We should harmonize the language used so that a judge will not be able to give any different interpretation, so long as what we do is in line with your explanation given in the House of Commons.

Senator Walker: Yes. That is it.

Hon. Mr. Ouellet: Well, Mr. Chairman, I agree with your view, and I submit to the members of the committee that in fact there is no contradiction between the view expressed and the content of this clause of the bill, because the Criminal Code is very clear on this, and I suspect that judges are aware of it. It is section 645(2). I am sorry that I only have the French version of the Criminal Code with me, but I understand you have a translation service here. I will read it slowly and possibly it could be translated. The Criminal Code says this:

> Lorsqu'une disposition prescrit une peine à l'égard d'une infraction, la peine à infliger est, sous réserve des restrictions contenues dans la disposition, à la discrétion de la cour qui condamne l'auteur de l'infraction, mais nulle peine n'est une peine minimum à moins qu'elle ne soit déclarée telle.

Therefore the million dollars there is not a minimum amount.

Mr. Cowling: That is quite right, Mr. Minister. I do not want to labour this, but I think the point really is that notwithstanding that provision in the Criminal Code, because of the fact that in a subsequent statute, which this will be, the legislature has seen fit to provide penalties in different ways, and that the intention may have been, in the case of the Combines Investigation Act, to override the provision of the Criminal Code which you have just read.

Senator Connolly: Mr. Chairman, in this connection are we talking about very many clauses of this bill?

Senator Walker: Just the one, is it not?

Mr. Lewis: Mr. Chairman, the main clauses we are talking about are 32(1) on page 24, and 36(5)(*a*) on page 32 of the bill as passed by the Commons.

Senator Connolly: That is in the discretion of the court.

Senator Flynn: Yes. That is clear.

Mr. Cowling: I have not combed the act. The one that was turned up that came immediately to mind was subclause 32(1), which is the penalty for conspiracy. As I say, I have not combed the act for others, but it seems to me that whether there is one example or two or three it is the same problem. It is perhaps even worse if there is only one example.

Hon. Mr. Ouellet: Well, I have no objection to having the legislation clearer. Quite obviously this section could be presented in a different form to make it clearer, to the effect that the $1 million is not a minimum. I suspect that that would be the only clause in the entire bill on this point.

Having this in mind, I suspect that many other bills exist where there are penalties that have used the same language, basing their assumption on section 645 of the Criminal Code. Granting to you the fact that we have, despite the section in the Criminal Code, made it clearer to meet Mr. Lambert's suggestion in committee, we have accepted some amendments to make it still clearer, and indicate clearly to laymen that in fact, where in the legislation it is said only that the person could be sentenced to imprisonment, that does not mean imprisonment automatically.

Now, I accepted those amendments because I accepted, Mr. Lambert's argument that for laymen it could look embarrassing, but this one is not really directed to laymen. It is directed to the judges. Surely they are in a better position to know the Criminal Code and read what a clause of a bill means better than a layman.

Mr. Cowling: As I said, I do not want to belabour the point but I think a judge would have to say to himself, "Why was it necessary for the legislature to put in Mr. Lambert's amendment?" He would not call it Mr. Lambert's amendment because that will be long gone by the time it comes before a court. It was unnecessary because the Criminal Code already provided for this.

The Chairman: Why was it done?

Mr. Cowling: He could conclude that the legislature's intention with respect to the Combines Investigation Act was really to put aside the general rules of the Criminal Code for all purposes. We do not know whether a judge would so conclude, but we feel it is a possibility, and should clarify it.

The Chairman: I think we have exhausted that particular point. Unless you have something more to say, can we move on to the next point?

Mr. Cowling: While we are on the subject of penalties—

Senator Connolly: Mr. Chairman, would you allow me to ask a question, just following up on that matter, because I am just looking at the memorandum that has been made available to us. Is it the intention then to review these three sections and try and get the language into uniform shape?

The Chairman: Well, that would be the ultimate goal in doing it, except that when you say, "a fine not exceeding" a specified amount then there can be no real confusion there. If you say "a fine in the discretion of the court," that is clear. You may not be able to interpret what is in the judge's mind as to how much he is going to fine that person, but the language is clearly such that you can understand it. If you fly in the face of a provision in the Criminal Code, which provides in effect for a discretion, even though you have a fixed fine, then you have got to say to yourself, "Perhaps Parliament intended this." Yet, when I read *Hansard*, and as I listen to you today, I know it was not intended.

Senator Connolly: But that is not available to the court.

The Chairman: No.

Hon. Mr. Ouellet: Except that section 645 of the Criminal Code should be known by the judge.

Senator Flynn: I am quite sure that the judge would be inclined to accept your view, Mr. Minister, but the perti-

nent question may be, "Why do the drafters of this bill use these forms?"

Hon. Mr. Ouellet: In one case we are dealing with an indictable offence. There, on the indictable offence, the tradition has been to draft it along these lines. The different language has been for summary convictions where, by tradition, bills have been drafted by giving the courts the lower courts more specific information, and saying "up to."

Senator Flynn: That is very interesting. That is the first time I have heard that. Do you suggest that the lower courts need to have a clearer drafting than the higher courts? Is tsat what you are saying?

Hon. Mr. Ouellet: Well, I am not here to defend the long legal tradition of Canada, but that has been the case throughout the history of Canada.

Senator Flynn: I agree with you. You are not here to defend it.

Hon. Mr. Ouellet: The tradition has been that for the magistrate's court is has been much more precise than for the higher court.

Senator Flynn: That is a fascinating theory, and I am glad to hear it. It is the first time I have heard it.

Senator Walker: Mr. Minister, aside from the humour of my friend and leader, which is always good, you yourself said one thing, and Mr. Marcel Lambert said another?

The Chairman: No, the same thing.

Hon. Mr. Ouellet: No, we both agreed.

Senator Walker: You both agreed?

Hon. Mr. Ouellet: Yes.

Senator Walker: Was it not Mr. Lambert who drafted this amendment?

Hon. Mr. Ouellet: No. What we amended were other parts of the bill, where there were only jail sentences, in order to explain more fully that a jail sentence does not automatically mean a jail sentence, and it could be a decision made by the judge to give a jail sentence, or to give a fine, or to give both.

Senator Walker: Quite so.

Hon. Mr. Ouellet: Therefore, there has been a series of amendments dealing with specific penalties in the bill where we said five years, or a fine, or both.

Senator Walker: Neither you nor Mr. Lambert intended that there should be, if the person is guilty, an arbitrary imprisonment for five years—no exceptions; five years or a fine of $1 million. You did not intend that. You meant not more than five years, as I understand you, and not less than $1 million

The Chairman: Not more than that.

Senator Walker: Not more than $1 million.

Senator Macnaughton: "Up to."

Senator Walker: Not more than that, all right.

Hon. Mr. Ouellet: "Liable to," and I think the word "to" is very important there. The word "to" means it could go up to five years' imprisonment or it could go up to $1 million.

Senator Walker: Fine. Then, Mr. Minister, with the greatest of respect, as a former Crown prosecutor, I think you should say so. I do not think there is any question about it. It is simple to say so.

I can see that if I were appearing for the Crown, I do not think I would have any trouble. There is no alternative here. Having regard for the way it is written at the present time I would say, "My Lord, it is automatic—five years' imprisonment a fine of $1 million."

The Chairman: Senator Walker, the only thing on the other side of the argument is that there is a provision in the Criminal Code which provides for a discretion.

Senator Walker: Yes.

The Chairman: The point is that when you find something specific you ask yourself, "Is this an intention of Parliament to override the discretion in the Criminal Code?"

Senator Walker: Exactly.

Mr. Cowling: Having tampered with the Criminal Code, I think you now have to go the whole route and fix up everything.

Senator Walker: Yes.

Mr. Cowling: It may be that there are other sections in the act which are not referred to in this bill, which is an amending bill, in which the same problem will arise.

Senator Walker: The minister says there are.

Mr. Cowling: I presume we cannot look at those now because they are not in the bill. It may be that they will come before Parliament in another bill at some time.

Senator Walker: Yes.

Mr. Cowling: Possibly the whole matter should be dealt with at that time.

Senator Flynn: I would even suggest to the minister that he might send something to the Minister of Justice, that they might review their method of drafting this kind of clause, and get rid of this tradition, which is based on an assumption which does not exist any more. It seems crazy to me that you should use one language because you are addressing yourself to a lower court and another language because you are addressing yourself to a higher court.

Mr. Cowling: Except, Senator Flynn, that the Criminal Code is quite specific in dealing with indictable offences.

Senator Flynn: I agree.

Hon. Mr. Ouellet: The Criminal Code gives, despite any other legislation, the discretion to the court.

Senator Flynn: When you want a discretion to be exercised, and when you agree that the discretion should be exercised, why not always use the same language?

Hon. Mr. Ouellet: Yes, why not always use the same language. We have been using the same language all the time.

Senator Flynn: But not the language of 100 years ago. I do not care for that. I like a bill to be clear when it reaches us. It is not that something has been done for years. I have heard that argument from the Department of Justice quite often. They will not budge. Let them be realistic and bring down legislation which everyone can understand, even judges of both the lower and higher courts.

The Chairman: I think, Mr. Minister, we have dealt with this matter to the extent that you understand what our thinking is. What is the next point, Mr. Cowling?

Mr. Cowling: This is not necessarily in order of importance, but flowing out of the discussion we have just had, as you know, Mr. Minister, the Senate committee proposed that the delay for the institution of proceedings by way of summary conviction be removed. The Criminal Code provides that summary conviction proceedings must be instituted within six months. The recommendation of this committee was that that limitation be removed for purposes of the Combines Investigation Act.

Apparently, you yourself thought well of that amendment because in the Commons committee an amendment to that effect was introduced. I do not have the reference in front of me, but I recall your remarks at the time supporting the amendment.

Then on report stage consideration in the house itself, a motion was introduced putting in a two-year limitation periods. So we went from six months to no limitation to two years.

Hon. Mr. Ouellet: That is right.

Mr. Cowling: There was no explanation, so far as I could find, in the *Hansard* of the house on the subject. The motion was simply agreed to. I wondered whether you were prepared to give us some explanation now?

Hon. Mr. Ouellet: Yes. Mr. Chairman, here again, as for the preceding case, I am a victim of the habit of the Department of Justice. The wording of any legislation has to be approved and finalized by the Department of Justice. As you recalled, quite correctly, the Senate committee recommended an amendment along those lines. In committee I was told that your recommendation was acceptable, and the bill was amended according to your recommendation.

Subsequently I received representation from the Department of Justice that to remove the time limitation entirely would contravene the general policies dealing with summary conviction prosecutions. Therefore, as a compromise, and to meet the objection of the six months' period, and at the same time not have the possibility of the summary conviction proceeding hanging for too long, it was determined that the limitation period should be for two years.

The Chairman: The difficulty is that the investigative processes in combines are, almost of necessity, lengthy in many cases, and by the time there is a culmination of those the six-month period has passed. If you averaged out the time it takes before the decision to prosecute is made, you might find it closer to four or five years.

Hon. Mr. Ouellet: I discussed your committee's suggestion with officials in the combines section of my department, and they agreed that the six-month period might be a little too short. They were quite willing to accept the suggestion to have a longer period. Inquiries dealing mainly with misleading advertising are the ones where summary convictions take place. Most of the long inquiries—the ones which you suggest take many years—are for combines and mergers, and therefore are indictable offences. The summary conviction ones might take more than six months, but rarely take more than one year.

The reason why we came back with a suggestion of two years, as a compromise between six months and a no ending period, is that the suggestion came from the Law Reform Commission that is studying the entire legal apparatus.

It has been said that the Law Reform Commission has been recommending a limitation period for summary conviction. The two-year period would be an acceptable compromise to meet the possibility that it could take more than six months.

The Chairman: Mr. Minister, I am interested in your reference to the Law Reform Commission, because in another connotation, on a subject matter that we still have to discuss, they have made a recommendation which you have not followed. I respect their judgment, but by what arithmetic did you arrive at the two-year period? How do you rationalize that?

Mr. Cowling: The Law Reform Commission recommended the two-year limitation on summary conviction offences—that is to say, offences triable only by summary conviction. What we are talking about in the Combines Investigation Act, in most instances I think, are offences that are triable, according to the legislation, either by indictment or summary conviction.

It seems to me that the Law Reform Commission may have had in mind the fact that if it is a summary conviction offence and no proceedings have been taken before two years, in effect the accused should be let off; whereas under the Combines Investigation Act, summary conviction appears as an option to indictment, and the same reasoning would not apply.

Hon. Mr. Ouellet: Except that there is a difference in the severity of cases.

The Chairman: Oh, yes.

Hon. Mr. Ouellet: Therefore if officials contemplated prosecution under summary conviction, it is obviously with clear-cut cases. It would be to the satisfaction of my officials, and the two-year period would appear to be ample time.

Senator Flynn: And if it is not ample time, you still have the right to proceed by way of indictment. So if you had a case that really should be proceeded with under the summary conviction rules, you would have no choice at that time but to proceed by indictment. Is that fair?

Hon. Mr. Ouellet: I can report to you that our experience in misleading advertising cases over the past 10 years is such that all of those cases could have been prepared and dealt with within a matter of nine or ten months.

Senator Flynn: What would you do if you were faced with a case which normally would be proceeded with by summary conviction, and the delay period had expired? What would you do—forget about it or proceed by way of indictment?

Hon. Mr. Ouellet: I suspect that you know very well, from legislation, that officials in the department are asked to prepare a case for the Department of Justice who make the decision whether or not to prosecute. I cannot give you an answer, because it will depend on the merits of the case. To be very frank about this, if a case of a minor nature takes too long to prepare, it is obviously not a very good case.

Senator Flynn: But if you wanted to proceed with it you would have to do so by way of indictment. You would have no choise.

Hon. Mr. Ouellet: I doubt very much that after two years a misleading advertising conviction would have the same deterrent effect, or would be of great significance.

Senator Flynn: You want us to have faith in the Department of Justice.

Hon. Mr. Ouellet: I am simply stating that from my experience we know right from the very beginning whether there is a case, and whether there is any substance to the case or not. Also, it does not take very long to prepare a case on one of these summary conviction matters.

The Chairman: Well, I think we have you point of view, Mr. Minister. You have endeavoured to justify the two-year period within which the summary conviction method might be followed. Certainly, two years is considerably longer than six months, but where you can proceed by summary conviction or by indictment, then whether you go one way or the other, I would think, depends on your opinion of the gravity of the offence.

The investigation involved can sometimes be a very long procedure in that it takes a considerable period of time to gather the evidence, conduct the hearings, following which the director makes a report to the Restrictive Trade Practices Commission which then holds a hearing and which in turn makes a report to the minister. In that course it is up to the minister to make a decision to prosecute or not to prosecute once he has received that report.

True, the director can short-circuit that process by referring the subject matter not to the Restrictive Trade Practices Commission but to the Minister of Justice. There are methods of short-circuiting the procedure, but one hates to see a prosecution by indictment, because the time for prosecuting on summary conviction has run its course. It may well be that if the time had not run out, it would have been a summary conviction prosecution.

Hon. Mr. Ouellet: Your explanation is accurate, Mr. Chairman, and you are quite right in saying that the final decision as to whether the offence will be proceeded with by way of summary conviction or by way of indictment is the decision of the Attorney General of Canada.

The Chairman: But he may have no choice by the time it gets to him.

Hon. Mr. Ouellet: Except that if it is a case dealing with misleading advertising—and I believe those are mainly the cases that could be prosecuted by way of summary conviction—then those cases are easily prepared in a fairly short period of time.

The Chairman: Yes, but your range of authority covers a much broader field than misleading advertising. I would be inclined to agree with you that in respect of a misleading advertising offence, where you could not make up your mind in six months whether to prosecute or not, you should forget about it.

Senator Connolly: Because of the nature of the offence.

The Chairman: Yes.

Hon. Mr. Ouellet: But we have the choice to prosecute by way of indictment or by way of summary conviction in respect of misleading advertising cases, but not on conspiracy cases or various other offences.

The Chairman: I think we have shaken this one.

Senator Flynn: We have not shaken the minister.

Mr. Cowling: In fairness to the minister, I think he agrees with it, but as he said earlier it was really as a result of a suggestion, or an opinion, from the Department of Justice that it went to two years. If I am right, perhaps we should ask a representative of the Department of Justice to appear.

Hon. Mr. Ouellet: I should point out that I made the final decision myself in presenting the amendment. As I said earlier, I did receive the view of the Department of Justice and also the view of the Law Reform Commission, out of which came this compromise, which it was felt would be acceptable, acknowledging the fact that this committee had expressed some fear that the six-month period would be too short and the fact that the Law Reform Commission expressed the other extreme, that being that it should not be an open-ended period. In trying to arrive at a compromise between those views, we decided that it should be a two year period.

The Chairman: What is the next item?

Mr. Cowling: Mr. Chairman, I am in your hands. An important item for the committee, and one which has not been dealt with in the House of Commons at all, is the proposal with respect to the air industry. This committee had a hearing quite recently on that. The transcript of that committee meeting has just come out, and I am not sure whether the minister has had a chance to look at it yet. It is issue No. 57.

Senator Flynn: Mr. Chairman, this is only part of the general problem affecting the regulated industries. If we were to settle the whole problem, we would then settle the problem of the air industry. Is that not correct?

The Chairman: In my view, yes.

Senator Flynn: We might as well deal with the whole problem, then, rather than just this aspect of it.

Senator Connolly: This one is pretty typical of the whole problem.

Senator Flynn: Yes, but it is only one of the industries affected.

The Chairman: It is the whole problem of regulated trades and industries.

Senator Flynn: That is right.

The Chairman: That is the general question.

Senator Flynn: I do not see why we should give preferred treatment to IATA. If there are others in the same situation, we should try to solve the whole problem; not

only the problem of IATA or the Air Transport Association.

The Chairman: Well, I would certainly be in favour of solving the whole problem. However, the method that has been followed by the government has been one of a piecemeal solving of the problems. It dealt with the problem of the Shipping Conferences by a special act of parliament proclaimed in 1971. It dealt with the railway industry at a different time in the Railway Act. That leaves, in the field of transportation, air travel, and that is why these people came to us. I suppose they felt that because special exempting legislation was accorded to the Shipping Conferences and to the railways, then that is what they should seek.

Senator Flynn: Separate legislation outside of this act?

The Chairman: Yes.

Mr. Cowling: I think it arises in respect of the airline industry now because of services being brought under the act by this bill.

The Chairman: I am sure the minister is familiar with the Shipping Conferences Exemption Act and what preceded it. The Director of Combines conducted a full-scale investigation into the Shipping Conference and the way in which it operated, following which he prepared a report on the analysis of the evidence, and, in his opinion, the way in which it operated constituted a violation of the Combines Investigation Act, even before services were brought under the Act. This was in 1965.

There was then a full-scale hearing before the Restrictive Trade Practices Commission, which finally issued a report, a copy of which I have, in which it found that there was a cartel in connection with shipping rates determined by the Shipping Conferences; but they concluded that that operated in the public interest.

Their report came out in 1965, and in 1970 Parliament introduced this legislation, the Shipping Conferences Exemption Act, and the minister who gave the explanation on second reading referred to the report of the Restrictive Trade Practices Commission.

True, here we have not had any investigation initiated by the combines people in relation to the manner in which international air travel rates are reached, or in which domestic rates are reached; but these people come to us and they say, "We are worried, because with the inclusion of services as being within the jurisdiction of the combines people under this bill, the method, that is the conferences, by which they reach a decision, might lead to an investigation and charges against the airlines who participate in those conferences."

Senator Laird: In spite of the fact, Mr. Chairman, that they are now regulated by the Canadian Transport Commission.

The Chairman: That is right. And in spite of the fact, too, that these conferences are preceded by an agreement between two countries, such, for instance, as the agreement between Canada and the United Kingdom. The authority to do the study of rates is put in the hands of IATA under that agreement, country to country. The approval has to be made by the aeronautical authorities, which in Canada would be the Minister of Transport and the Canadian Transport Commission.

Senator Flynn: I would like to put a question bluntly to the minister. Why would he not agree to exempt from the application of this act all trades, industries and professions which are regulated, inasmuch as they are regulated with respect to the problems in the Combines Investigation Act, either under the federal authority or the provincial authority?

Hon. Mr. Ouellet: If you will allow me, Mr. Chairman, I would like to deal first with the IATA question, because I have listened to the remarks made by you, and also by some other senators who have views on this question. I would like to single out a few points in it, and then I would like to spend some time in answering Senator Flynn's question on professions or groups that also come under the act.

Dealing with the IATA question, the amendments that the Senate committee, in its second report, put forward recommend in fact that exemptions should be made for agreements and arrangements affecting air transportation, reflected in written contracts as filed—I think it is important to understand the activities of the Canadian Transport Commission. These written contracts, as filed with the Canadian Transport Commission, might, among other things, fix air fares and tariffs.

The difficulty that I have with the current amendment is in fact on two grounds. First of all, we are assuming that the Canadian Transport Commission is really having a hearing, and looking at this, while in fact what happens is that these things are only filed with the Canadian Transport Commission.

Secondly, the agreements that are arrived at by countries, or by governments of countries, have to do with routes, not with fares.

I frankly suggest that no reason has been given why such agreements and arrangements should not abide by the general rule in regard to regulated industry. In my view there is just as strong a need for meaningful scrutiny in the public interest in this particular area as in any other area of regulation.

I have no objection to the activities of IATA, or these contracts or agreements or arrangements, being exempt from the operations of the act. I have no objection to that as long as the Canadian Transport Commission assumes the responsibility for in-depth examination of such fares and tariffs, and direct responsibility for the rates arrived at. The way that the Canadian Transport Commission could do it would be to follow the same procedures as they do with regard to Bell Telephone, for instance. Then we could say that it may be assumed that the public interest is protected, and the Canadian Transport Commission, in its judgment, acting on behalf of the public interest, would be fully regulating these arrangements.

The Chairman: Now, Mr. Minister, I can tell you, because I have read, for instance, the agreement between Canada and the United Kingdom, that there is a paragraph in that agreement that deals specifically with tariffs and tolls, in which both countries designate IATA as the vehicle for the determination of rates, tariffs and tolls, and it relates them to the aeronautical authority in each country that must approve these things.

Mr. Cowling: It is not just a question of routes. May I quote, Mr. Chairman? I think it is important. It is Article VII of the United Kingdom-Canada agreement.

Senator Connolly: What is the date?

Mr. Cowling: I do not know. it is quite an old one.

The Chairman: I have it in my office, but I did not bring it down.

Senator Connolly: These are notes, are they?

Mr. Cowling: No, I am reading from the transcript of the last hearing of this committee, at which Article VII went into the record. It says:

> The tariffs referred to in paragraph (1) of this Article shall, if possible, be agreed in respect of each route between the designated airlines of the contracting parties, in consultation with other airlines operating over the whole or part of that route, and such agreement shall, where possible, be reached through the rate-fixing machinery of the International Air Transport Association. The tariffs so agreed shall be subject to the approval of the aeronautical authorities of both contracting parties.

Hon. Mr. Ouellet: If possible.

Mr. Cowling: Yes, but it refers to tariffs.

The Chairman: The other thing that I was going to say was, we had the Air Transport Association of Canada here a week ago.

Senator Connolly: What you have said so far, Mr. Chairman, if I may interject, has to do with international routes and international tolls and tariffs is that right?

The Chairman: Yes.

Senator Connolly: All right. Now we come to the domestic aspects. Is that it?

The Chairman: We had evidence here from the Air Transport Association a week ago in which they spoke of two hearings before the CTC, within the last year or 15 months, on the question of tariffs and rates, in which public organizations—the Consumers League, or something like that—appeared. We also had evidence that the Canadian Transport Commission maintains a staff of technical experts who themselves check all these rates.

Then, when you examine the regulations which have been passed under the authority of the Aeronautics Act, you will see the authority which they have, and the authority amounts to a lot more than just the filing of a tariff with them. They have power to say no. They have power to substitute a rate.

Then they use language which bothers me: they talk about "prescription". I know the meaning of the word "prescription", but I do not know what it means in the context in which they use it. I concluded that it meant that they could prescribe rates themselves. So they have those authorities to do those things.

Then the question arises, if those authorities exist, in provincial and federal legislation, should that not entitle the industries and trades affected to be regulated industries and trades, if the authority exists for dealing with them and dealing with their rate structures, et cetera. If that happens, then why should the combines people propose to check on the operations?

The thing that bothers me is that the National Transportation Act created the Canadian Transport Commission. It gives the commission the authority, in all these fields of transportation, and they are a court of record.

The Aeronautics Act designates the federal authority as having absolute authority in the field of aeronautics. That is a decided case in the Supreme Court of Canada after it became our court of last resort. It is therefore a reasonably current decision, and was handed down in 1956.

With all these checks and double checks, the question is, why should we leave a situation where, because of the authority to inquire into services, and to determine whether the public interest is being protected, Parliament has made statutory provision for that? If the people they have designated are not doing it, then Parliament should deal with it, but the concerns that are created by statute should not be subject to another statute.

Hon. Mr. Ouellet: When we approach this question, I think it could be relevant to look at the trend that is now taking place in other countries—in the United States, for instance. The trend is away from regulation in this industry, in favour of more independent action and competition.

I am also told that the director of the competition bureau of the European Economic Council is indicating his intention to inquire into the pricing practices of these industries in Europe, apparently because there have been very large and unexplained fare differentials over certain routes.

Senator Connolly: Are these tariffs controlled in Europe, in the Community?

Hon. Mr. Ouellet: I understand they are controlled in about the same ways as they are in Canada and the United States, and the point is that in Europe as well as in the United States they feel, as do we, that there should be some competition. That is expected in the air transport industry, and therefore I have no objection, as I believe I have said, to these questions being exempt from the Combines Investigation Act, as long as the Canadian Transport Commission has the authority, and exercises that authority, to look at fares and tariffs, to look at them in depth, and pass a judgment that it is in the public interest.

The Chairman: Well, you know, Mr. Minister, if the Canadian Transport Commission have the authority—and I think any fair reading of the statutes will indicate that—and they do not exercise it, then it is time for Parliament to do something; but where they should do something is in relation to the Canadian Transport Commission, and the statute under which they operate.

Hon. Mr. Ouellet: Well, you have certainly raised a good point.

Senator Connolly: It seems to me, Mr. Chairman, that what the minister really has said, without using his kind of blunt language, is this, that the Canadian Transport Commission may have the authority but it is not exercising its authority, and somehow the public welfare has to be looked after, and if the Canadian Transport Commission is not going to do it, then we want to do it under the Competition Act.

Senator Laird: Yes, but a lot of us think we are overregulated already, so why add another body to regulate us?

Senator Connolly: I do not know that this is regulation. This is investigation of offences after they have been committed. But it seems to me that the clause that is proposed is a vote of non-confidence in the activities of the CTC. This may be justified—I do not know. It has been said after a while a regulating authority falls into the hands of the people who are to be regulated. That is a rather general kind of statement, but certainly the regulating authority gets to understand some of the problems of

the industry to be regulated, and perhaps they are a good deal more sympathetic to their needs than might apply under the Competition Act, which, after all, is pretty much a blood-and-thunder piece of business.

Mr. Cowling: It would put the airlines right under the gun, there is no doubt about it, because of the long-standing practices which they have built up; and, therefore, these arguments aside, and the argument that the minister has been raising aside, the dilemma falls on the industry if it is powerless to get the CTC to do whatever you think it is that it should do—

The Chairman: And is not doing.

Mr. Cowling: —in order to exercise the degree of control that should be exercised, and until that time it is bound, with respect to international affairs, in virtue of agreements between Canada and other countries, to continue with the process that has always been in effect. That is the dilemma, and one would think that if a change had to be made it would have to be introduced more gradually or more rationally, or on a more planned basis than simply putting them straight under the gun.

Senator Connolly: It is something that requires urgent action, and perhaps this is the way to do it rather than introducing an amendment to the CTC legislation. I can understand the position of a government that is looking at this problem and saying, "Actually, and in fact, we have no way, really, of protecting the public's interest with regard to air rates, air tariffs and air fares. The CTC has the authority, but it is not being exercised. Therefore we will throw it under the Combines Investigation Act." Now, is that the fact, and is that the way to do it? I think that is the problem we have here.

The Chairman: On the evidence we have, it is not the fact and, certainly; when you look at it, the question is, is this the way to do it? After all, the same government created the National Transportation Act. It created the Canadian Transport Commission, and it made agreements with other countries as to how rates were to be arrived at. Therefore there is a responsibility on government. Simply to say, "We are going to turn the Competition Act loose on the CTC" is not necessarily the right way to do it. We must assume that the CTC has been operating for some time, and perhaps they have a little more expertise than the combines investigators who would go in on the job.

When I hear it said that all you do is file forms with the CTC, that is not the evidence we have been given here.

Senator Macnaughton: Mr. Chairman, my impression is that the airlines, who appeared here a year ago and who were here a few weeks ago had something to do with it—I think, just as a sponsor—and were happy with the CTC. They have these international agreements. It is rather hard to extend the CTC authority over all foreign countries; in fact, it could be denied. So, the arrangement up to date has been working. I am not aware of any criticism by the airlines that the CTC are not doing their job, and that they themselves are unhappy with it. It seems to me a practical arrangement.

Hon. Mr. Ouellet: It would be surprising that the companies would object to the activities of the CTC. I am not passing a final judgment on this, but we are saying that the CTC may or may not be really controlling or reviewing these agreements, the way it is suggested.

The Chairman: They may not be doing their job well.

Hon. Mr. Ouellet: I know very well that it is the responsibility of the CTC to deal with Bell Telephone rates for instance. Public hearings are held and there is intervention from various sources. Lawyers representing various groups or interests attend. There are public hearings and a decision is made.

Senator Benidickson: By Parliament.

Hon. Mr. Ouellet: I am not aware that the CTC is doing the same thing, in dealing with the air industry. Therefore, I am saying that unless we are very sure that the competition is taking place in the air transport industry, I am reluctant to give an exception for this particular industry if, in fact, there is no public interest scrutiny or supervision at some point.

If the CTC, in fact, has the authority and exercises it, there is no problem. We would be quite prepared to accept such an amendment; there would be no difficulty there. But the fact of the matter is that we are under the impression that these contracts are just filed with the CTC; there is really no monitoring or evaluation of these contracts by the CTC.

Senator Connolly: Is this the kind of thing, Mr. Minister, you talk about with your colleague, the Minister of Transport? I do not want to pry into cabinet secrets, but do you approach it from the point of view of, "Well, the CTC really is not doing a job, but we are going to try it." You have got a two-edged sword here. As the chairman says, perhaps your duty is to make the operation of the CTC more meaningful and then you do not need it here, or abolish this right in the CTC, and keep it in the Combines Investigation Act.

Senator Laird: Mr. Minister, is this the right mechanical way to do this job? Your job obviously is to protect the public, the consumer. In other words, are you putting one board, more or less, in control of a situation which could be handled by another board?

Hon. Mr. Ouellet: Well, at the moment, my answer to your question would be "yes." It is the easiest way to deal with the situation. Now, if it is the wish of your committee that, in fact, it should not be dealt with by this legislation but that it should be dealt with by another commission, that would mean that the other commission would have to be looked at and start to exercise its responsibilities, and then we could make the amendment.

Senator Laird: Yes, but that other commission would be the existing one, hopefully, the Canadian Transport Commission. If we have one commission that is capable of doing it, why give any jurisdiction at all in this field to another commission?

Senator Macnaughton: Mr. Chairman, I think we should keep in mind too that conditions have radically changed in the last two years.

The Chairman: Yes.

Senator Macnaughton: Just to say these airlines get together and fix their rates and go to the CTC and have it stamped, I do not think that is so. They have weeks of negotiations between the different countries and different airlines and whatnot, which is subsequently put in treaty form.

The Chairman: Yes. Take, for instance, the U.K. and Canada; the aeronautical authorities in each country must approve. So, the board method seems to be a good, workable method, generally speaking. Now, if this is not a good method, then something should be done about it. It is a creature of Parliament. Parliament has created it. To say, "No, what we are going to do is leave you there, and we are going to ride herd on you to see whether there is really competition," my position is—it is only my position as chairman for purposes of discussion—that that is not the way to resolve problems as between two separate statutory bodies that have been created by the same Parliament.

Hon. Mr. Ouellet: Well, senator, I think that I had the duty to express my point of view vis-à-vis these questions, as I see them, under the legislation.

The Chairman: You are part of the legislation affecting the CTC by virtue of being a minister of the Crown, that has jurisdiction.

Hon. Mr. Ouellet: Could I say this: I am not an authority and I am not in a position to confirm or challenge the testimony that previous witnesses have given here on behalf of the airlines or on behalf of IATA.

It might be useful—I do not want to give any direction to your committee—but it might be useful to bring in that witness, the minister who in fact is directly concerned with these questions.

The Chairman: We thought of inviting the CTC. We have been debating what their reaction might be when you invite members. They may feel that they are a court of record, under the statute. They have power to fix whether they hear things publicly or privately, and they have power to conduct investigations, all under the National Transportation Act; and one hesitates. We might have to invite the minister in order to get into this problem. We are just wondering how far we should take it.

Hon. Mr. Ouellet: Well, as far as this legislation that you are studying now is concerned, it is quite clear that we have extended the scope of this legislation to services. We are hoping that competition is expected in any type of service, including the air transport industry. I do not see how we could rationalize that competition should exist in any type of service but transportation. At the same time, I appreciate the particular situation of the air transport industry, but even there I assume that competition has to be expected in this industry and they should conduct themselves accordingly.

Mr. Cowling: They have been treated as monopolies under the law up until now. That is the historical pattern. I think that is why it is difficult to make a change because they have been brought along on that process.

Hon. Mr. Ouellet: Except that, in fact, there are numerous airlines competing on certain routes.

The Chairman: Yes.

Hon. Mr. Ouellet: And one of the difficulties, and I am not passing judgment on the situation in Canada, but I have read articles of the situation in the United States, and in the United States it is quite evident that there is a wide variety of discrepancies between rates that exist in various parts. It makes people wonder what it is over.

The Chairman: Maybe we have read the same articles about Europe. I am trying to recall where I read it. It was very recent. They were comparing rates on passenger movement between certain points in Europe. If you were going one way, there was a certain rate, and if you were going in the opposite direction, the rate might be twice as great. There were a lot of inquiries into why this should be. That is understandable. The government has created a body that is supposed to look after that.

Senator Connolly: Mr. Chairman, on a very minor point, it does seem to me that if the CTC has authority to deal with the regulation of air rates, tariffs on domestic activity within Canada, that is one thing, and that authority and that power can be made as strong as the government of the day might want to make it.

The Chairman: That is right.

Senator Connolly: I am not too sure that the authority of the government effectively to do the same thing in respect of rates on international routes is as good. It may bind Canadians.

The Chairman: You mean it cannot do it by agreement?

Senator Connolly: I suppose it can do it by agreement, but that is not regulation, strictly speaking. That is almost the point of a combine, is it not?

The Chairman: You mean a combine between, say, the Government of Canada and the Government of the U.K.?

Senator Connolly: Officially, that is the way it is done. What happens is—

Senator Benidickson: I read the other day that at the moment unanimous consent is required on tariffs, and, as it happens, the one country in the world that wants to be free or wants a lower tariff is Air Canada. Under the IATA agreement, all countries have to agree or leave membership.

The Chairman: You mean you cannot change the rates?

Senator Benidickson: One member of IATA is not free to differ from the combine understanding or agreement on tariffs. In this instance, Air Canada is faced with the problem of withdrawing or persuading this government to withdraw from IATA or have tariffs uniform with the rest of the world, not lower than any other item in the tariff agreed upon.

The Chairman: We decided that we should adjourn at 4 o'clock. We are not abandoning you, Mr. Minister. I stated, in opening our proceedings today, how important we regard this bill and our duty to move the bill along as quickly as possible. We intend to do that. We will have sittings next week, certainly on Wednesday and possibly on Thursday, if necessary. We will meet your convenience, Mr. Minister.

Hon. Mr. Ouellet: I am at your disposal.

The Chairman: Does the afternoon suit you better than the morning? I know you have other duties that you must attend to in the morning.

Hon. Mr. Ouellet: I have a speaking engagement on Wednesday evening. If it is agreeable to the committee, I would be willing to attend on Wednesday morning.

The Chairman: Then you have a date with us next Wednesday morning at 9.30.

The committee adjourned.

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1974-75

THE SENATE OF CANADA

PROCEEDINGS OF THE
STANDING SENATE COMMITTEE ON

BANKING, TRADE AND COMMERCE

The Honourable SALTER A. HAYDEN, *Chairman*

Issue No. 61

WEDNESDAY, NOVEMBER 19, 1975

Third Proceedings on Bill C-2, intituled:

"An Act to amend the Combines Investigation Act and The Bank Act and to repeal an Act to amend an Act to amend the Combines Investigation Act and the Criminal Code"

(Witnesses: See Minutes of Proceedings)

29702—1

THE STANDING SENATE COMMITTEE ON BANKING, TRADE AND COMMERCE

The Honourable Salter A. Hayden, *Chairman*

The Honourable Senators:

Barrow	Hays
Beaubien	Laird
Buckwold	Lang
Connolly (*Ottawa West*)	Macdonald (*Cape Breton*)
Cook	Macnaughton
Desruisseaux	McIlraith
Everett	Molson
*Flynn	*Perrault
Gélinas	Sullivan
Haig	Walker—(19)
Hayden	

**Ex officio* members

(Quorum 5)

Order of Reference

Extract from the Minutes of the Proceedings of the Senate, October 28, 1975.

"Pursuant to the Order of the Day, the Senate resumed the debate on the motion of the Honourable Senator Cook, seconded by the Honourable Senator Paterson, for the second reading of the Bill C-2, intituled: "An Act to amend the Combines Investigation Act and the Bank Act and to repeal an Act to amend an Act to amend the Combines Investigation Act and the Criminal Code".

After debate, and—
The question being put on the motion, it was—
Resolved in the affirmative.

The Bill was then read the second time.

The Honourable Senator Cook moved, seconded by the Honourable Senator Burchill, that the Bill be referred to the Standing Senate Committee on Banking, Trade and Commerce.

The question being put on the motion, it was—
Resolved in the affirmative."

Robert Fortier,
Clerk of the Senate.

29702—2

Minutes of Proceedings

Wednesday, November 19, 1975
(79)

Pursuant to adjournment and notice the Standing Senate Committee on Banking, Trade and Commerce met this day at 9:30 a.m.

SUBJECT: Bill C-2—"An Act to amend the Combines Investigation Act and The Bank Act and to repeal an Act to amend an Act to amend the Combines Investigation Act and the Criminal Code."

Present: The Honourable Senators Hayden, (*Chairman*), Barrow, Beaubien, Cook, Desruisseaux, Flynn, Haig, Laird, Macdonald, Macnaughton, McIlraith, Molson, Sullivan and Walker. (14)

Present, not of the Committee: The Honourable Senators Asselin, Benidickson and Lapointe, (*Speaker*). (3)

In Attendance: Mr. R. J. Cowling, Advisor to the Committee.

Witnesses:

Department of Consumer and Corporate Affairs:

The Hon. André Ouellet, P.C., Minister; and

Mr. Robert J. Bertrand, Assistant Deputy Minister and Director of Investigation and Research.

The Committee, together with the witnesses, proceeded to further discuss the said Bill as passed by the House of Commons.

Following discussion, it was *Agreed* that Mr. Ouellet again appear Tuesday next, November 25, 1975, at 9:30 a.m.

At 12:20 p.m., the Committee adjourned until later this day.

ATTEST:

Frank A. Jackson,
Clerk of the Committee.

The Standing Senate Committee on Banking, Trade and Commerce

Evidence

Ottawa, Wednesday, November 19, 1975.

The Standing Senate Committee on Banking, Trade and Commerce, to which was referred Bill C-2, to amend the Combines Investigation Act and the Bank Act and to repeal an Act to amend an Act to amend the Combines Investigation Act and the Criminal Code, met this day at 9.30 a.m. to give consideration to the bill.

Senator Salter A. Hayden (*Chairman*) in the Chair.

The Chairman: Honourable senators, the witness this morning is the Honourable André Ouellet, Minister of Consumer and Corporate Affairs. On the last occasion that the minister was here your chairman was so anxious to get proceedings going as quickly as possible that he overlooked one question that we usually ask all witnesses, that being whether or not they have an opening statement to make. I discovered at the conclusion of the meeting last day that the minister did have an opening statement, and at that time I promosed him that the first item of business today would be a deferred opening statement.

Senator Flynn: Mr. Chairman, are you sure he should not keep it as a closing statement? It all depends on what he has in mind.

The Honourable André Ouellet, Minister of Consumer and Corporate Affairs: Thank you, Mr. Chairman. I welcome this opportunity to make an opening statement. Because it is a deferred opening statement, it will be a short one. Basically, I want to express my delight to the members of the committee for this opportunity of appearing as a witness before you. I come here with satisfaction because I am well aware of the work of your committee so far. In fact, the work of this committee has helped me, my officials, and members of a similar committee of the other place in working towards improving Bill C-2.

I want to pay particular tribute to the chairman of this committee for the initiative he has shown in dealing in advance with legislation, which is a brilliant way to go about the work of Senate committees, in the sense that not only does it allow members of the Senate to study the legislation in depth but it also allows us in the other place an opportunity to improve, in advance, our own legislation.

Secondly, I want to emphasize that I appear before you with an open mind. I am here to discuss the various aspects of the legislation that are of interest to you. I am available to answer your questions and receive your suggestions.

Finally, I want to say that I hope the members of this committee will bear in mind that Bill C-2 embodies the first series of amendments to the Combines Investigation Act. As you are well aware, it is the government's intention to introduce, in the early part of the next session, a further series of amendments to the Combines Investigation Act. Therefore, I look forward to being back before your committee at a later date in dealing again with the Combines Investigation Act, and I hope the members of the committee will keep this in mind in dealing with Bill C-2.

I might say, we have asked a group of five experts to draft what could be referred to as phase two of our competition policy, and they are: Bill Twaites, former president of Imperial Oil; Dr. Skeoch, formerly of Queen's University; Bruce Mcdonald, a lawyer from Toronto; Michel Belanger of the Montreal Stock Exchange; and Ruben Bromstein, a lawyer for the Small Businessmen's Association of Canada. They have almost completed their work; and I expect to receive their draft on phase two of our competition policy by the end of this month. This would mean that the document would be made public. It would then be open for discussion. On the basis of this document there will be a series of amendments to the competition legislation, and to other similar types of legislation. Their recommendations will be the basis of a new bill which we will definitely introduce to Parliament in the early part of next year.

Mr. Chairman, I thank you for allowing me the opportunity to say these few words. I am now in your hands.

The Chairman: We will now get down to the business of the meeting. I should tell the committee that requests to be heard continue to be received. Some of them involve phases with which we have already dealt.

For instance, we have not only a letter but copies of a brief from the Winnipeg Commodity Exchange. They are concerned about the operation of Bill C-2 and the matter of a regulated trade or business. They have made a statement in their brief referring to the Grain Futures Act. I have not had an opportunity to read it, as yet. I just received a copy of it this morning. This is only a suggestion, however, and they state that there are provisions in the Grain Futures Act, which is a federal statute, under which they are regulated in connection with their operations. Therefore, we again have this question boiling up from another angle. We also have the Canadian Manufacturers Association, who still wish to be heard. The question is: How do we deal with them? There are only so many days in the week and so many weeks before we reach a stage when everybody is thinking about a Christmas recess. It is hard to refuse people an opportunity of being heard, but I think we can put them on terms.

Senator Flynn: Concerning the representation made by the Winnipeg Commodity Exchange, we have dealt with this. I think it would be sufficient to tell them that we have considered their problem, and that we may or may not suggest an amendment. What they are saying is the same thing as IATA.

The Chairman: Yes.

Senator Flynn: I do not see the purpose of hearing all these arguments again and again.

The Chairman: No. They fall into the same category as regulated trade and industry, which has been the subject matter of discussion. They also fall into the category of IATA. So, depending on how we feel about that, this will be an answer to their brief.

We have heard from the Canadian Manufacturers Association, who are rather late in coming forward. This matter has been publicly aired for some months. We will have to find out the topic they wish to speak on and whether or not it is a subject we have already dealt with and heard submissions on. If that is so, we will just explain that to them and say there is a shortage of time. There has been ample opportunity to arrange an appointment to appear. This is the way I will deal with it.

We also have a request from the Association of Canadian Franchisors, who distinguish between what you would call product franchises and business franchises. Their brief develops the theory of each. They say that what has been done so far, in dealing with this subject, has been the matter of product franchisors. Theirs is a business franchise. It is a different angle.

I do not know if the minister is prepared to deal with this matter this morning. If not, we can discuss it with his officials and get an answer from him later.

Senator Macnaughton: Mr. Chairman, in view of the importance of the organizations, and in view of our desire to give everyone a chance, could we not fix one afternoon, say, a two-hour period and divide it among the three of four groups?

The Chairman: I thought you were going to suggest that we have a free-for-all; the person with the loudest voice is the one who gets the floor.

Mr. Minister, I do not know whether the distinction that they make between a business franchise and a product franchise clearly comes to your mind at this moment. They suggest the difference is this: A business franchise can be defined as an arrangement under which a person grants a right to another to operate a business in accordance with prescribed operating methods or procedures, controlled by the grantor, which business utilizes the grantor's knowledge, expertise and distinguishing marks or names, and under which the grantor maintains a continuing interest in the business by advising, with regard to its operations, and a continuing right to either direct or indirect compensation. They have excluded from that definition the product franchise. I do not know whether this has come to your attention before. I will give a copy of this memo to you and to Mr. Bertrand and invite your comment. You will then be able to deal with this.

Hon. Mr. Ouellet: Yes, thank you. I would appreciate receiving a copy, Mr. Chairman.

The Chairman: Last day we had moved along quite a distance on the question of regulated trade and industry. We are talking particularly of IATA and also of the Shipping Conferences Exemption Act. I think some reference was made to a report in some form that the Law Reform Commission is supposed to have made. My understanding of that report on the question of the period within which a summary conviction procedure might be followed had more reference to a termination period, after which you could not bring a summary proceeding, rather than the exact subject matter we were talking about. If it becomes important, Mr. Cowling is familiar with it and we can talk about it. In the meantime, Mr. Cowling, will you pick up where we left off last week?

Mr. R. J. Cowling, Special Counsel to the Committee: Mr. Chairman, we were in the middle of our discussion of the position of the air industry in Canada and the effect of Bill C-2 on that industry. I might, just by way of reactivating that discussion —I do not think we fully dealt with it— put a question to the minister in these terms: In view of the fact that historically, since inception the different carriers have consulted each other and agreed on certain matters and have done this really under the auspices of the government by virtue of bilateral treaties that the government had entered into at the international level, and with the encouragement of the Ministry of Transport on the domestic level, is it fair suddenly and brutally to put them under the effect of the combines legislation? The minister referred to the necessity for more competition in the industry. This may be so, but it seems to me that this should be accomplished on a more gradual basis rather than simply taking them out of one regime and putting them under another, which is a very general regime, one which is not tailored to their special needs in any way.

Hon. Mr. Ouellet: In order to be a little more precise with respect to this question, I would like to say that I think it is clear that the interface between competition policy and direct government regulation is an extremely important subject, which must be considered very carefully. Now, to deal with it in a piecemeal fashion for one particular group—and, of course, this group, IATA, agrees that it is an extremely important matter which ought to be carefully considered—in my opinion, would be irresponsible. The very fact that a recent study indicates that there are some 117 quasi-independent federal regulatory agencies, 70 provincial regulatory agencies in Ontario alone—I understand there are 53 in Quebec and at least 30 in most other provinces—brings to light the situation that it creates a general problem. It might be inopportune to select one aspect of the general problem, air transport, for isolated and incomplete attention at this stage. Therefore, I wish to suggest that the subject of government regulation should be dealt with in a comprehensive manner. I assure you that it will be dealt with in a comprehensive manner in phase two. Study has already been made in preparation for the bill to which I referred in my preliminary remarks, which will come before Parliament in phase two. Phase two of the revision of the competition policy will be concerned especially with those matters which affect the structural issues of industry raised by merger, monopoly and specialization agreements. I could undertake today before you to say that this question of uncertainty which exists for the transportation industry must and could be clarified in the course of the coming months, after full discussion with my colleague, the Minister of Transport, and the appropriate decision made as to whether it would be dealt with through the Canadian Transport Commission or the Combines Investigation Act. However, to arrive at the conclusions which in my opinion most members of this committee wish, that is, a clarification of this situation to make sure that this industry would not be in doubt—

Senator Laird: Mr. Minister, may I make the suggestion that, if you intend to reconsider the whole position, it is scarcely fair to the air transport industry not to exempt them from phase one, because in the meantime, during that

interim period, they will be in a frightful state of confusion, subject to two regulatory bodies—that is, the Canadian Transport Commission and the one provided in this legislation. Therefore, would it be unreasonable to suggest that in this particular bill the air transport industry be exempted so that confusion will not arise during the interval, which might be a year—who knows?

The Chairman: Senator Laird, before the minister answers, rather than using the word "exempt", which is not the most popular word in the minister's vocabulary, as appears from statements he had made from time to time, would it accomplish the same result if it were stated that this bill is not intended to deal with the transport industry? That would not be an exemption, but it would be effective.

Senator Laird: I do not care about the semantics, Mr. Chairman, as long as the effect is there of not putting them into a state of confusion.

The Chairman: No, because the minister's statement, as to what he would be ready to undertake, I would interpret to mean that no effort would be made until the question is resolved as to which way the regulations should proceed, but the provisions of this bill would not be applied, or it is not intended that they should be applied to the transport industry.

Senator Laird: That would be satisfactory, because then it would be a matter of record before this committee.

Senator Flynn: Except that if six persons were to lodge a complaint, or something of that nature, the commission would have no choice but to look into it.

Hon. Mr. Ouellet: I will ask the Director of Investigation, Mr. Bertrand, to answer these two questions. There is, I understand, jurisprudence on which the transport company could hang its hat, so maybe Mr. Bertrand could elaborate a little on that.

Mr. Robert J. Bertrand, Assistant Deputy Minister, Competition Policy, and Director of Investigation and Research, Department of Consumer and Corporate Affairs: If you recall the discussion we had during the last meeting of this Senate committee, there was a great deal of reference to the regulatory activity of the CTC, its power of examination and the fact that it does examine. I believe your counsel and the chairman made the point that it was, subject to examination, controlled by the CTC. By applying your reasoning and the way the argument developed last week, and by applying the farm product marketing case in the Supreme Court and the McRuer decision in the *Canadian Breweries* case in the Ontario Supreme Court, you would find that airlines as such would be exempt.

Now, the other aspect is that by which you say we should exempt all transportation. I should remind you that under the present legislation transportation of goods is covered by the act, so you are really suggesting that what is covered presently should not be covered, rather than saying that the extension to services should not extend. If I read you correctly, I believe you would like to see the present act amended to remove completely the transportation of goods.

Senator Laird: And passengers.

Mr. Bertrand: But passengers are not covered at the moment.

Mr. Cowling: I believe that is why the airline industry has come forward at this time. There might have been a case for saying they were covered under the old act, because they do transport goods, although I do not have the figures on it, but I assume they are still largely engaged in the transportation of passengers. Therefore, that aspect of their business is to be regarded as the provision of a service, which is why they came forward at this time with that problem.

Senator Laird: I know the mood of this committee with respect to relying on case law, Mr. Chairman. It has shown a certain amount of suspicion that case law may not be applicable and if there is a doubt about the situation it should be dealt with legislatively.

The Chairman: Yes. Circumstances alter cases, and judges today may well, in the light of developments which have taken place in the interim over a period of years, reach, in their reasoning process, a different conclusion, because their case law has been upset from time to time. We find over the years, if you study the reports of the Privy Council when they were the last court of appeal for Canada, that it became necessary to find distinctions, explanations and differences. In the beginning, when the subject matters to be dealt with were not great, they may have used language that committed themselves further than was necessary in order to make the immediate decisions.

Senator Laird: That is what is worrying me.

The Chairman: The minister has said he will undertake. If we accept that undertaking, we have to know what it means, and how it can be given other than by saying in the bill that it is not the intention of the bill at this time to cover the field of transportation. Is that wording too broad?

Hon. Mr. Ouellet: I think it is, Mr. Chairman, because basically the Combines Investigation Act already covers a part of the operation. Secondly, I am quite prepared to meet some of the fears expressed by members of this committee by saying, for the new area now covered, that in order to clarify the situation we will undertake to have an in-depth study and come up with a positive conclusion one way or the other on phase two. But basically we assume that competition is expected in the air transport industry and that the industry should conduct itself accordingly.

I hope and believe that everyone here accepts this understanding. Whether it is monitored by the Director of Combines and Research or whether by the CTC is a question that has to be clarified. I am quite prepared to ensure that it will be clarified in the course of the coming months.

Therefore, by the time we introduce phase two of our competition policy we will know exactly whether it should be regulated through the CTC or under the umbrella of the Combines Investigation Act.

Senator Macnaughton: Mr. Chairman, does the minister mean that he would agree to suspend the application of the act pending introduction of phase two?

Hon. Mr. Ouellet: We believe there is a genuine misunderstanding. My impression here is that because of the courts' jurisprudence, the air transport company might not fear the extent of this legislation; but because of a potential danger, we might clarify it more definitively at the next phase.

We are talking about a matter of a few months. Firstly, this legislation, C-2, will have to be proclaimed. It takes months for that to happen. Under services, we have said that the proclamation will not come before a certain period of time. We will give, in the service section, a leeway. Therefore I think we are talking about a framework long enough to clarify the situation.

Senator McIlraith: Mr. Minister, you used the expression "Competition is expected." Is not the situation such that the air industry—the passenger and freight-carrying aspects of it—are made monopolies by the federal government through its licensing controls? That is, you not only designate a particular company but you grant it the right to fly from A to B only and not from or to any place it likes in Canada, so the federal government is the one who creates the monopoly, not the company itself. Is that not correct?

If that is so, has not the federal government traditionally, at least since 1936, developed a system of regulating and controlling the monopoly position because it was a monopoly? That has been the traditional method. I am unable to understand how you reconcile the competition method of preventing abuses, because you have prevented unlicensed competition by the licensing procedures under the air legislation, and it seems to me it cannot be made applicable; it is inconsistent with the nature of the creatures we have put into operation in the air industry.

Hon. Mr. Ouellet: Yes; except that I said last week that the Canadian Transport Commission has been asked to analyze in depth the procedures and tariffs arrived at in Bell Canada, for instance. Therefore there is an in-depth process in that area.

Senator Molson: Excuse me, Mr. Minister. Is it not a fact that Bell Canada has no competition? There are not two telephone companies in competition, but there is more than one airline. Does that not make it a little more difficult, in comparing the two?

Hon. Mr. Ouellet: Except that some airlines have a monopoly on certain routes. That is a different approach. Basically, as I told you at our last meeting, if the CTC were going to embark on this process of in-depth examination, there would be no difficulty on our part. We would, of course, assume that the CTC is performing its role in representing the public interest.

Mr. Cowling: Mr. Minister, it is because you made that remark that there is some cause for fear; because it indicates that they do not get protection from the breweries case or the maketing case. You are suggesting that there is something that the CTC should do which it is not doing that would bring the industry within the scope of the jurisprudence; but it is beyond the power and the ability of the industry itself to see to that. That is why I say they are in a dilemma.

Senator McIlraith: In the sphere of international air transport it is my understanding that international agreements entered into by the Canadian government with governments of other countries compel the designated airline to adopt certain techniques or practices that would, in the ordinary course, be contrary to our proposed legislation. The safeguard lies in the regulatory authority and the requirement that they go before the CTC. If we enact this legislation in its present form, without clarification of the point, are you satisfied that we are not breaking the agreements we have entered into with other governments in the international air field?

Hon. Mr. Ouellet: Yes, I am.

Senator McIlraith: Could you elaborate on that? I find that difficult to understand.

Hon. Mr. Ouellet: These agreements are entered into between governments for the purpose of mutually exchanging air routes. These agreements provide a *modus operandi*, or an apparatus of procedures, agreed to by members of IATA, and that apparatus of procedures is imposed on all members. It happens that in certain countries the airlines companies are owned by the government. Basically, these agreements are not agreements arrived at between governments, but agreements arrived at between firms.

Senator McIlraith: My understanding is that these are agreements between governments, and after designation of the airline, certain requirements and agreements between the firms are entered into, and the procedure that the firms or companies have to use are fixed in the agreement between the governments. That is what compels them to operate in a way that would ordinarily be inconsistent with the competition legislation. If we do not clarify that point, we are in fact compelling the airlines, by international agreement, to operate in a certain way and, on the other hand, saying that what they are doing may be illegal, although we are compelling them to do so.

The Chairman: Supplementing what you have said, Senator McIlraith, and for the information of the minister, may I refer to article 7 of the agreement between Canada and the United Kingdom? Article 7 reads as follows:

> (1) The tariffs on any agreed service shall be established at reasonable levels, due regard being paid to all relevant factors, including cost of operation, reasonable profit, characteristics of service (such as standards of speed and accommodation) and the tariffs of other airlines for any part of the specified route. These tariffs shall be determined in accordance with the following provisions of this Article.
>
> (2) The tariffs referred to in paragraph (1) of this Article shall, if possible, be agreed in respect of each route between the designated airlines of the contracting parties, in consultation with other airlines operating over the whole or part of that route, and such agreement shall, where possible, be reached through the rate-fixing machinery of the International Air Transport Association. The tariffs so agreed shall be subject to the approval of the aeronautical authorities of both contracting parties.

The aeronautical authority, so far as Canada is concerned, would be the CTC.

Article 10 then deals with those instances where the parties cannot agree. It states:

> (1) If any dispute arises between the contracting parties relating to the interpretation or application of the present Agreement, the contracting parties shall in the first place endeavour to settle it by negotiation between themselves.
>
> (2) If the contracting parties fail to reach a settlement by negotiation,

(a) they may agree to refer the dispute for decision to an arbitral tribunal appointed by agreement between them or to some other person or body; or

(b) if they do not so agree or if, having agreed to refer the dispute to an arbitral tribunal, they cannot reach agreement as to its composition, either contracting party may submit the dispute for decision to any tribunal competent to decide it which may hereafter be established within the International Civil Aviation Organization or, if there is no such tribunal, to the Council of the said Organization.

Then the parties agree and undertake to comply with any decision that may be given on that reference. That agreement was entered into in 1949.

Senator McIlraith: Of course, there are a great many such agreements throughout the world.

The Chairman: Yes.

Senator Molson: Would these agreements be subject to the combines legislation in other countries, Mr. Chairman?

Mr. Cowling: I think that Dr. Thomka-Gazdik told us that such agreements would be subject to the combines legislation in the United States, but that there was a special exempting provision. The United States, of course, does not have the same kind of jurisprudence exempting regulated industries to the extent that we have it. The United States courts have always recognized that there is an opening for combines or anti-trust legislation, as they call it, even though the industry is regulated. I believe we were told by Dr. Thomka-Gazdik that they did have a special exemption in the United States.

Hon. Mr. Ouellet: Article 7 obviously indicates that these tariff agreements arrived at under the umbrella of IATA have to be ratified by the respective aeronautical authorities.

The Chairman: By the aeronautical authority of each country, yes.

Hon. Mr. Ouellet: The aeronautical authority in Canada is the CTC, and that is what we ask.

Senator Flynn: That is not in the bill.

Hon. Mr. Ouellet: We ask that the aeronautical authority, being the CTC, exercise its full authority over civilians. We do believe that for the time being there is no danger of a case developing until we have had an opportunity of correcting the situation in phase two, at which time we will put forward a definite position on this.

The Chairman: One danger, I think, Mr. Minister, was in the suggestion or statement you made, that being that the present bill, in relation to some aspects of it relating to service, would apply to transportation, and there might be other sections which, although not being exempt, would not be made to apply. The risk—and it is a real risk—is to have a divided liability. Who is going to draw the line as to when the bill applies and when it does not apply? For that reason, it would not appear to me at the moment to be the way of attacking the problem. After all, we all have a reasonable understanding and intelligence, and when a minister undertakes that nothing—and perhaps I am paraphrasing you—that nothing would be done to disturb the transportation system as it presently exists and is being carried on until the whole area of transportation had been fully studied and the responsibility put in whatever place the government of the day determined it should be, that is one thing, but if that is the intent, certainly we have sufficient words in the English and French languages to be able to translate that meaning into legislation.

Hon. Mr. Ouellet: I believe the type of assurance that you want is because of this new legislation. In the meantime, until the second part of a series of amendments to the Combines Investigation Act is introduced, the air transporter in Canada will not be affected by the new scope covered by Bill C-2. It will not, in any way subject them to further regulations, or a difference of regulations, in this sense.

Mr. Cowling: Or prosecution.

The Chairman: Or prosecution.

Hon. Mr Ouellet: Well, I cannot handcuff the Director of Investigation and Research. You know that.

Senator Flynn: You cannot change the law by an assurance.

Hon. Mr. Ouellet: I could not change the law. I can say this: There are two important elements, I submit, which should satisfy the members of this committee; first of all, the precedents that now exist; and, secondly, the clear indication that we will in the coming months come forward with a precise proposal to clarify the situation.

My brief, and my colleague's, the Minister of Transport, attempts to establish within the Canadian Transport Commission the mechanisms that will alleviate any doubt that does exist.

Mr. Cowling: What you are saying, Mr. Minister, is that in the meantime violations of the Combines Investigation Act by the air industry, and perhaps other regulated industries, would be tolerated.

Hon. Mr. Ouellet: That is not what I am saying. First of all, I say that Bill C-2, dealing with the service section, will not be promulgated for a period of time after the bill is passed. It will be a decision by order in council. In the meantime I hope that we can find the proper apparatus so that when the bill is promulgated this section dealing with services will be promulgated. Then the situation will be corrected.

Senator Cook: Mr. Chairman, I was about to say it seems to me that there is a good deal of doubt about the whole question of how far the jurisprudence goes and how far it does not. The committee report refers to the problem and to the minister's undertaking to give the whole question study before the next debate or the next session. We do reserve our right to reject these provisions if we are not satisfied with the final treatment of the matter. It seems to me that should be satisfactory at this time.

The Chairman: Well, like the illustration I used last night, no matter what the intentions are, or no matter what kind of statutory reservations you make, that does not bind the judge who may be trying the case to follow that law. He will read it and say, "This is what it says."

Senator Walker: Always.

The Chairman: This is like the pious hope in a lot of wills where the testator says, "I would like my executors to do thus and so." That is just a pious hope; there is no obligation on the executor to follow that.

Senator Walker: When you want to be generous in the will, and there is no validity, that is the way you put it.

The Chairman: You are generous but without validity.

Now, this is not too far away from the suggestion Senator Cook has made about the statutory reservation.

Senator Molson: Mr. Chairman, may I ask the minister a question? He was saying one of the problems of regulating industries is that there is a large number of them and it creates a general problem. Well, we understand how complex it is. Fundamentally we are very sympathetic with the problem.

My question is: Why do we include these regulated industries in the first phase? When the minister says that an in-depth study has to be made, and in the course of some months there will be some decisions made as to how to cope with these matters, why do we start out by having all these matters, why do we start out by having all these problem children included and then conduct studies to see if some of them should be excluded? Why are regulated industries not omitted in the first instance, and in phase two brought in if there are reasons for it? It appears to me that you are building the problem first in order to then attack it and try to solve it. Or am I wrong?

Hon. Mr. Ouellet: Mr. Chairman, if I understand what is being said, it is because we have included under the Combines Investigation Act services which were not included under it before. Canada is in fact the last occidental country to include services. They have been included in the United States for years. They have been included in most major European countries for years. By bringing services now under the umbrella of the Combines Investigation Act, you create a sort of new surveillance, if you will. Some organizations could easily escape the combines grip because they are strictly regulated.

Senator Flynn: Properly.

Senator Beaubien: Properly regulated.

Hon. Mr. Ouellet: They are the creations of a provincial government and it is established they are not coming under the Combines Investigation Act. Others have to be looked at for precision. That is the case we are confronted with at the moment. Basically, we have said all services should be included.

The Chairman: I am trying to get an appreciation of what you meant when you said that you would undertake thus and so. We are still talking about it, so obviously we have not a framework set up as to what undertaking you are prepared to give.

Hon. Mr. Ouellet: Well, let me put it this way. Bill C-2 will be passed. I will not set a date, but let us say it will be passed, and you say you are hopeful that you will be able to complete your work before Christmas. Fine. Then Bill C-2 is passed. Then there is royal assent and then promulgation of the act. The promulgation of a certain part of the act will come within a matter of weeks. More particularly, in the service section, we have said that we will give sufficient time to the service industry to prepare themselves because of the new legislation. This will be a period of three, four or possibly five months. We might not promulgate this section until we have been able to settle clearly the question of whether or not the CTC is doing this monitoring and this in-depth decision making. If the mechanism is in place within the CTC to do the in-depth evaluation, it is quite clear the Combines Investigation Act does not apply. We could then promulgate it without difficulty.

The Chairman: Here are some of the difficulties I see. We may as well deal with them right now because this is the place for it. As and when any terms are put in the bill regulating the time at which promulgation may be made in relation to services, and the decisions that might be reached in that time, we would want to know something about it. We would not want to be shut out of the process. If there is no legislation at that time we are shut out of the process. In other words, the government resolves the problem and we have no authority to say anything about it.

Hon. Mr. Ouellet: Except that the questions of regulated industry will come to you through phase two of the Combines Investigation Act and we will be addressing ourselves to these very questions.

The Chairman: You are suggesting, then, that when phase two comes before us we can go back, look at and revise phase one?

Hon. Mr. Ouellet: No.

The Chairman: I do not think we can.

Senator Laird: That is the danger.

Senator Walker: The minister means adding to it and if that is so and in the meantime phase one is to lie in limbo, why not eliminate phase one in the meantime and do phase one and phase two together?

The Chairman: Except, Senator Walker, if you say that phase one shall not come into force until phase two is ready. I wished simply to point out to the minister the Aeronautics Act, which has been considered by the Supreme Court of Canada before and after that court became the court of last resort in Canada. Therefore, in effect, it is acknowledged as being the undoubted authority in the field of aerial transportation. I find in the Aeronautics Act that the commission may under the provisions of section 16.(1):

> ... issue to any person applying therefor a licence to operate a commercial air service in the form of licence applied for or in any other form.

Section 16.(2) continues:

> No such licence shall be issued in respect of a commercial air service, owned, leased, controlled or operated by any person who is engaged in the transport of goods or passengers for hire or reward by means other than aircraft unless the Governor in Council is of opinion that it is in the public interest that such licence be issued.

So the rule we used to apply with respect to motor transportation in order to qualify for the various classes of licences issued in a province was that the operation must be for public necessity and convenience. Now, that is a form of public interest.

Section 16.(3) reads as follows:

> The Commission shall not issue any such licence unless it is satisfied that the proposed commercial air service is and will be required by the present and future public convenience and necessity.

So, we have the test of public convenience and necessity, which is a form of public interest, this being the authority

of the commission to deal with that. Now we have the commission given full authority, as provided in the Aeronautics Act, to enact regulations and when one refers to the regulations which have been enacted we see contained in section 14(1)(m), in Part II, the language that: respecting traffic, tolls and tariffs and providing for

> (i) the disallowance or suspension of any tariff or toll by the Commission,
>
> (ii) the substitution of a tariff or toll satisfactory to the Commission, or
>
> (iii) the prescription by the Commission of other tariffs or tolls in lieu of the tariffs or tolls so disallowed;

Section 14(1)(n) then continues:

> respecting the manner and extent to which any regulations with respect to traffic, tolls or tariffs shall apply to any air carrier licensed by the Commission or to any person operating an international air service pursuant to any international agreement or convention relating to civil aviation to which Canada is a party;

Now, the power of regulation specifically deals with tariffs, tolls and a variety of matters. The power is given by the one undoubted authority under our law which has the authority so to deal with it. In those circumstances, to impose restrictions under which the Combines Investigation Act could be made to apply and enable a study to be made and proceedings to be taken to investigate the quality and the scope of the authority exercised, seems to be going a long way. This is the point which bothers us; at least, it bothers me.

Hon. Mr. Ouellet: Mr. Chairman, I have listened to you very carefully and the argument that you are making is precisely, I suspect, the argument that a lawyer would be making on behalf of a company, if ever a company were accused. That type of argument is along the lines of the cases, the *Canadian Breweries Ltd.* case or the farm marketing products case, which have been sustained by the court in the past. In my opinion, such types of argument meet right on the points that indicate that the Combines Investigation Act should not apply in such cases, because the industry is properly regulated. In my opinion, you have yourself answered the questions.

The Chairman: Yes, but I am not a judge.

Hon. Mr. Ouellet: Well, you are a very good lawyer.

The Chairman: Whatever my opinion may be, I am stating it only as an opinion; I cannot make a pronouncement as a judge.

Hon. Mr. Ouellet: Yes.

The Chairman: Referring to the questions posed by Mr. Justice McRuer at the end of his judgment in the *Canadian Breweries Ltd.* case, the two questions are very short and are as follows:

> ... Has it been proved beyond a reasonable doubt that the merger has conferred on the accused the power to carry on its activities without competition, or substantially without competition? I think the irresistible answer is no.
>
> I ask myself this further question: Has it been proved beyond a reasonable doubt that the merger has conferred on the accused the power to control the market so that the provincial authority in the exercise of its duty in fixing prices cannot protect the public interest? To this question I think the irresistible answer is no.

Those were the two questions which marked the approach of Chief Justice McRuer to his judgment in this case, where he held that there was no detriment to the public interest in the acquisition of quite a number of breweries by Canadian Breweries Ltd.

Now, it may well be that the law goes so far—I am not ready to express that opinion yet—that if there is provincial regulation there is no place for the federal authority. I do not know whether the McRuer judgment goes that far, but it may well. By the same token, it may well be that the Supreme Court of Canada, if the same point were developed today, might have a different view.

Mr. Cowling: There may also be some aspects of the business of the air carrier which do not come under the authority of the CTC as clearly as do tariffs. For example, scheduling, as I understand it, has traditionally been something on which the airlines were expected to make agreements. In fact, the CTC in issuing orders have even gone so far as to state that the order is conditional upon the two or more airlines getting together and making agreements as to scheduling. For example, it was pointed out to me that if there was no such rationalization the public would get service from airlines only at peak periods. You would then have two or three airlines operating flights around the same time because there were plenty of passengers. That would not be proper; there should be a service throughout the day, even in non-peak periods. Obviously it is wasteful to have two or three airlines operating at times during the day when there is not the load factor. They have traditionally agreed that such-and-such an airline will handle the morning flights and another will handle the afternoon flights, and they will all operate at peak periods. It is not absolutely clear that this is something that the CTC can prescribe, although, as I say, I believe they have made it a condition in the issuance of orders. Perhaps this is an area where they could not get the benefit of the McRuer judgment. That is just one example.

The Chairman: We have discussed this problem pretty thoroughly. I am still concerned about the nature of the undertaking, if any, that the minister indicated he might be prepared to give. We could discuss this subject for a much greater length of time and still not resolve anything this morning. We have other points that we wish to develop with the minister while he is here.

Hon. Mr. Ouellet: Before moving to another point, Mr. Chairman, could I, in capsule form, express to the members of the committee what they are asking me and why it is difficult for me to give an answer, because some of the points raised are outside my jurisdiction.

Firstly, I refer to new section 32.

I am sure that everyone agrees that services should be under the Combines Investigation Act. That applies in other countries and we believe that Canada should have done this a long time ago.

Secondly, because all services are now under the act, it creates some difficulties for a certain type of regulated industries.

Senator Flynn: Trades and professions.

Hon. Mr. Ouellet: Yes. I outlined the many quasi independent federal regulatory agencies, and so on. You, as

members of this committee, come to me and say "Well, the transport people are afraid. They think the law is a little obscure and they would like to have a clear-cut assurance that the act does not touch them."

Perhaps that is a legitimate request, that the air transport people should ask for clear-cut information on whether or not they will be hit or whether they are okay because the CTC will take care of them.

I am being asked to give a clear-cut indication on this. My problem is that if we do it for one group, we open the door to any other group that might fear they are cut by this legislation. That is the danger and the difficulty. I put it clearly to you.

I understand and appreciate the difficulty and the fear which some groups might have; but at the same time I say to them, as well as to the professions and other groups, "Look, there is jurisprudence, there are cases where you could feel certain that you are not, in fact, cut the new act. Perhaps you have some fear, but do not fear unduly, because we feel, firstly, that there is some jurisprudence on which you could build your case; and, secondly, it is not the government's intention to replace, through the activities of the Director of Investigation proper and due surveillance and monitoring in the public interest which exists through the regulatory agencies, whether federal or provincial. We do not want to duplicate work and we do not want to put various activities under two sets of controls."

Obviously the answer I have given is not clear-cut. I cannot say to the air transport people, "There's no problem; we won't bother you"; except that I can say to them, Mr. Chairman, that they should hire you as their lawyer if they have a problem, because you have expressed yourself on this matter very eloquently.

Senator Molson: There would be a conflict of interest!

Hon. Mr. Ouellet: You have expressed, in your remarks Mr. Chairman, how they should defend themselves and how they could easily prove, I submit, that the Combines Investigation Act does not cover them. So their fear, in fact, should not be as great as they have expressed it to you. Many other groups could come before you and say, "We are lawyers and we are not sure that the Combines Investigation Act will not infringe on our rights," and so on. In fact, there is sufficient jurisprudence to clearly establish that they would not be cut.

Secondly, in order to alleviate any apprehension until we pass this legislation and it is promulgated, I will do my utmost, in consultation and cooperation with the Minister of Transport, to properly establish within the CTC the mechanisms that will ensure without doubt that they are, in fact, properly regulated. That is my suggestion.

It should be clearly established that the CTC is properly regulating the air transport industry. It is a better route than the exception route within this bill, because you would specifically earmark a group, and other groups would then come along and say "Perhaps we are not covered, but suppose we are covered? Give us this exception." We would then have an open-end list of people who would be exempt. In fact, they are exempt if they are properly regulated.

The Chairman: Mr. Minister, would your undertaking regarding the proclamation be along these lines: that the part of Bill C-2 dealing with services, to the extent that it may extend to air transport in any form, shall not be proclaimed until such time as the part two legislation has been proclaimed—

Senator Flynn: —and a solution, a formula, has been found in the meantime to make it clear that all properly regulated industries, trades and professions are exempt or do not come under this act.

Mr. Cowling: It would go a little further than air transport. If I understood the minister correctly, he said the studies would be carried out not only on air transport but on all regulated industries.

Hon. Mr. Ouellet: One problem is that unfortunately I cannot separate, in section 32, the many types of services that we are obviously anxious about coming under the Combines Investigation Act. If it were possible to do that split, I would have no objection; but I cannot penalize, under section 32, if I might use that word, the 95 per cent of good things that we want to introduce immediately for the 5 per cent of the others. That would obviously delay the implementation of this legislation.

I can assure the committee, Mr. Chairman, that the section dealing with service industries will not be proclaimed before the government's position in relation to air transport and government regulated agencies is known. As I indicated earlier, we will be tabling phase two in the house early in the next session.

The Chairman: On that point, Mr. Minister, the heading preceding sections 30 and 31 of the bill is "Repeal and Commencement." Section 30 reads as follows:

> 30. *An Act to amend an Act to amend the Combines Investigation Act and the Criminal Code,* chapter 23 of the Statutes of 1966-67 is repealed.

Then section 31(1) states:

> Subject to subsection (2), this Act shall come into force on a day to be fixed by a proclamation issued under this subsection.

Then we come to the important part, section 31(2), which states:

> (2) For the purpose of applying section 32 of the *Combines Investigation Act,* as amended by this Act, to conspiracies, combinations, agreements and arrangements related to services to which that section does not now apply at a day that is later than the day fixed by a proclamation issued under subsection (1), any provision or provisions of this Act that are specified in a proclamation issued under this subsection, and any provision or provisions of the *Combines Investigation Act* enacted or amended by this Act and specified in such proclamation shall come into force on a day fixed by a proclamation issued under this subsection.

So, there is authority in the bill under which the government can issue two different kinds of proclamations. The government may issue a proclamation by which it brings into force all the provisions of Bill C-2 which do not introduce new concepts into the conspiracy law under Bill C-2. But under the exception in section 31(2) you may in the proclamation specify the area which is not included in the general proclamation for such time as you may choose. So, you do not lack the authority to do it, and something of that nature must have been in contemplation when the bill was drafted.

Hon. Mr. Ouellet: Mr. Chairman, it was contemplated that we would proceed with two proclamations, one for all

of the bill with the exception of section 32, and another proclamation for the purpose of applying section 32 of the Combines Investigation Act. Section 32 deals with service industries. We felt that we could proclaim that section at a later date in order to give the service industries an opportunity to prepare for it. This is why I can undertake to the committee that the proclamation with respect to section 32 can be made a little later.

The Chairman: Well, "a little later" is a very indefinite expression.

Hon. Mr. Ouellet: I have already indicated, Mr. Chairman, that it might not be before the report setting out the government's position with respect to regulated industries is tabled, or any bill related to phase two of our competition policy is tabled.

Senator Flynn: If you would give an undertaking that it would not be proclaimed before you tabled an amending bill in the other place with retroactive effect, I think we would be satisfied with that.

Hon. Mr. Ouellet: Obviously, that would have to be a decision of the government.

Senator Flynn: Of course.

Senator Cook: As I understand it, when the government has made up its mind on the question of regulated industries, for good or for bad, it will then make the proclamation, but not before? You are in the process of making up your mind now on the question of regulated industries, and when you have made up your mind then and only then, for better or for worse, you will make the proclamation?

Hon. Mr. Ouellet: Yes.

Senator Laird: What worries us, Mr. Minister, is that when something is dealt with legislatively it has a nasty habit of staying there and never being changed.

Hon. Mr. Ouellet: Let me consult my adviser. I do not want to hang myself.

The Chairman: Honourable senators, as I have just indicated to the minister, we have moved a considerable distance in our understanding of the problem. We have had suggestions as to various kinds of language that might be used to protect what we think should be protected, and also to keep the minister from getting beyond the depth that he feels he can go in his position as Minister of the Department of Consumer and Corporate Affairs.

What I have suggested to him is that if we pursue this matter further with these spontaneous suggestions, we may come up with some answers but we may also come up with a lot more questions that enlarge the issue again. What I have suggested to him is that we will be sitting next week on Tuesday, Wednesday or Thursday, or maybe all of those days, and we can both work on a draft of what this language should be. If we are ready, we can exchange notes in the meantime. The committee can look at it in the meantime and then we will meet with you next week on this point. Not I would like move to the next point.

The next point has to do with misleading advertising and the language which is used in the bill as to the defence you might have if there is a charge of an error in advertising so as to create misleading advertising. Mr. Cowling and I have had discussions as to the language that is used in the draft. The one word that seemed to confuse the situation was the use of the word "forthwith." I found it impossible to understand or to agree with the suggestion that it is misleading advertising where there is an error, and you make that an offence. However, you say that in order to escape being charged with an offence, you must "forthwith" publish a correction. I am paraphrasing the exact language, but Mr. Cowling will give it to you.

"Forthwith" must have a starting point. Is the starting point when the error is made, or is the starting point when you discover that you have made an error? Obviously, in any rationalization of the subject, you cannot recall or correct the error until you know about it. Therefore, "forthwith" seems to be an unfortunate word.

In the discussions in the house this particular clause was discussed. I think the minister made a statement at that time which suggested that "forthwith" meant as soon as or immediately after the error came to the attention of the person who had made this misleading statement. Now, this is the subject we want to discuss with the minister. Would you take that over, Mr. Cowling?

Mr. Cowling: Honourable senators, on page 39 of the bill you will find the "due diligence defence" that was inserted in the clause. It appears at subsection (2) of proposed section 37.3. The amendment follows the suggestion the Senate committee made, except with respect to the point the chairman was making, and you find that in paragraph (d).

Perhaps we should have a comment from the minister, Mr. Chairman. You outlined the difficulty that we are having here with it.

Hon. Mr. Ouellet: Basically the reason why we had to use such language was to create a situation whereby measures could be taken at the earliest opportunity. Otherwise you create a clause where a person could always find an excuse and even correct the error after the prosecution is laid.

Basically we welcome the suggestions made by the Senate committee and accept the "due diligence" because we felt that it was a sound and just recommendation. Someone has to establish a line at one point in time. We established the line and said "All right, an honest error could exist." If there is an honest error, obviously the one who is guilty of this error will correct it forthwith.

If we do not have this word "forthwith" that means that the error could be corrected at any time. We are not very much concerned about the honest people because we know they will do the correction immediately. We are concerned with those who are not as scrupulous. They could, if the door is left wide open, always come before the court and say, "Yes, it is an error; I am sorry, I will correct it." Even before the court it would not be too late because they could always make a correction.

We thought the "due diligence" should be accepted. We felt it was important to have a precaution, in order to make sure that these defences could be taken in some cases, if it is clearly established that the error was an honest error, and the correction took place almost immediately.

The language had to be tight and it had to be tight in a way that it still would be left to the discretion of the court to decide. I think we could leave this to the discretion of the court.

Senator Walker: Mr. Minister, the point is, if I read the French correctly, it says, "shall be made without delay". I

think there is no issue on that point at all. However, it is without delay from what point? Is it the point of discovery of the error?

Hon. Mr. Ouellet: After the publication.

Senator Walker: After the publication. Suppose he does not discover it for ten days after the publication, and he then corrects it at the first opportunity after it has been drawn to his attention, or when he discovers there is an error, is it intended that he shall be guilty of an offence even though he takes steps immediately the discovery is made?

Senator Cook: Surely, if the court believes him at all—it depends on the court, does it not—whatever language you put here, the minister gets back to the discretion of the court.

Senator Walker: There is no delineation in the wording other than, after the representation was made, or the testimony was published. So, the court has no discretion.

Senator Cook: They have to find *mens rea*, they have to find he was doing it.

Hon. Mr. Ouellet: You see the danger is that the "due diligence defence" could be very useful to the benefit of the large merchants whose responsibilities can be diffused among clerks and other employees. The small merchant cannot say that he depends on the vigilence of others. He is the one. I believe the honest merchant will always easily establish that he took steps to correct the situation after it came to his attention. The dishonest merchant, if the door is too open, could always have a due diligence defence, and that is what you want to avoid.

Senator Flynn: I agree with that.

Senator Walker: I in no way intended to suggest that you open the door wider, Mr. Minister. My suggestion was rather that we should seek to make the language a little more precise as to what is meant by the use of the word "forthwith" in the context in which it is used. I was seeking precision and clarity.

Hon. Mr. Ouellet: Deligence could be before as well as after. The precaution should be taken before the publication.

Mr. Cowling: That is covered by paragraph (d).

Senator McIlraith: It is not that; it is merely the use of the word "forthwith" in the latter part of paragraph (d) which causes me concern. The other parts are quite agreeable.

Mr. Cowling: Could I put it this way, Mr. Minister, that this section is designed to give a defence in the event of a mistake. If the person made an honest mistake, which is the only type of mistake which could invoke the section, is it not also reasonable to assume that the fact that he has made the mistake will not come to his attention necessarily "forthwith"? It may have to be pointed out to him by a customer, or perhaps by a telephone call from an officer of Mr. Bertrand's department, but it will have to be brought to his attention in some fashion. Certainly I think we have no difficulty with saying that he must take the remedial action "forthwith", even faster than that, if he can, upon its being brought to his attention. However, it seems to me that there could be a hiatus there which would, in effect, render the defence almost meaningless.

The Chairman: That is the interpretation the minister gave.

Mr. Cowling: I searched for definitions or judicial interpretations of the word "forthwith" in other statutes. It is a word which has been interpreted many, many times. About all I could find was that it is defined as "as soon as practically possible". However, that still does not overcome the difficulty in the present context. I was not able to find any assistance in any previous cases in that respect, that the time must be fixed from which "forthwith" starts, if you will.

Mr. Bertrand: Mr. Chairman, the intention of the word "forthwith" is that we are moving from strict liability, when there was no defence, so to speak, to due diligence. Therefore, now we must have a system, or ensure that reasonable precautions are taken before the advertising is published to make sure there is no error. Also, as soon as the advertising is published, the company or the advertiser would make a test, use the due diligence and make sure that really what is advertised and published is correct. That is the intention of the word "forthwith".

The Chairman: Supposing he makes a test and it takes time, when does "forthwith" start to run?

Mr. Bertrand: You must remember that it is to bring the error to the attention of the class of persons likely to have been reached. If the store is closed the newspaper is out, some advertising is put in the store and the next morning instructions are given to salesmen to correct the error to anyone who presents himself, if the advertising said yesterday a price of $9.99 you can say the next day that should have been $99.99, there is no doubt it is done "forthwith".

The Chairman: Then the correction is being made as soon as possible.

Hon. Mr. Ouellet: Sure.

The Chairman: It is not being done "forthwith".

Mr. Bertrand: The "forthwith" is to bring to the attention—

The Chairman: Yes; "forthwith".

Mr. Bertrand: Yes.

The Chairman: Well, "forthwith" means "at once".

Mr. Bertrand: How could it be brought to the attention when the store is closed between midnight and the morning?

The Chairman: That is what I am asking you.

Mr. Bertrand: " . . .took reasonable measures to bring the error to the attention". You have to tie together "reasonable measures" and "forthwith".

Mr. Cowling: Could you say "as soon as he became aware, or should reasonably have become aware"?

Hon. Mr. Ouellet: There is no problem with the honest merchant, obviously, but the dishonest one would take advantage of this wording and would always have a defence of due diligence.

The Chairman: So the moral of the story, Mr. Minister, is that in order to catch the dishonest merchants we penalize all the honest ones?

Hon. Mr. Ouellet: No, I do not think so. I have more confidence in the judges and, frankly, I am sure that there would be no prosecution taken if it were quite clear. How could this department have a case if it were evident that corrections had been made almost immediately following the error? In my opinion, we must give certain discretion to those who will be administering the act. Secondly, we must have faith in the judges.

Senator McIlraith: Actually, Mr. Chairman, there is a problem here for the translators of the languages. The French version does not seem to contain the difficulty that the English does, to the same extent.

Senator Flynn: Oh, yes it does; "sans délai" and "forthwith" are the same.

Senator McIlraith: They are not; the English translation will not translate "forthwith" and "without delay" in the same way at all. They are quite different; this is my point. They will not give in the English-language courts for the word "forthwith" the identical translation they will give "immediately", or "without delay".

The Chairman: As far as I am concerned, the minister gave the interpretation when he was explaining this amendment in the House of Commons. I did have a copy of his statement recently, but I do not have it at the moment. In explaining to the house the meaning of the word "forthwith" he said "as soon as", "immediately it came to his attention". Now, I am ready to accept "as soon as" but "forthwith" presupposes a time. What is the time? Is it when the statement was made or when it is found out that a wrong statement was made?

Mr. Cowling: We must remember, also, that the defence applies not only to misleading advertising in the sense of publications in a newspaper but also to section 36.1, which deals with representation as to reasonable test and publication of testimonials. I can follow the point made by the minister a little more easily in the case of a newspaper advertisement, in which one might argue that the publisher or advertiser should obtain a copy the next day and check it very carefully. However, I wonder if it would be as easy in the case of the other section to which I refer.

The Chairman: Or in the case of a catalogue.

Mr. Cowling: Yes, which only comes out perhaps once a year.

The Chairman: Yes; although I am sure they are working on them all the time. Are there any further questions with respect to that point?

Senator Flynn: I do not think we should worry too much about the language. Of course, it could be clearer but, on the other hand, it could give the chance to someone to say they did not discover the error until a week later. Who can contradict such a statement?

The Chairman: The judge can say that that evidence is not relevant.

Senator Flynn: We have only his word for it. It seems to me, going by what the minister has said, that if someone has proceeded within the best delay, if you wish, you will not lay a charge against him. It could appear to be persecution if you did and the judge would certainly say "without delay" or "forthwith" mean that he did it as soon as he could.

The Chairman: Yes, but his opportunity to say that would only be admissible in mitigation of damages, a fine or peanlty. It would not be on the subject of defence or no defence.

Senator Flynn: I cannot see any such cases arising as that.

The Chairman: We are at the stage of deciding what governs the word "forthwith"—forthwith when published, or forthwith after the error is discovered?

Senator Flynn: It is after; I do not say after it is discovered, but forthwith after the publication, or without delay after the publication means as soon as is possible after the publication and it cannot possibly be done unless it is discovered.

The Chairman: That is right. Senator, you sound very much like the judge who would be trying such a case. He might say, "It's a very nice thing to say that that is what it means, but it does not say so in the book."

Senator Flynn: It seems to me the kind of reasoning that appears in the courts. It seems to me that judges are not interpreting the law as strictly as they used to do some 50 years ago.

Senator Cook: If you were a merchant of good repute, Mr. Chairman, and you made a mistake and were prosecuted, the courts would throw out the case very quickly. A person's reputation would come into it before a court would convict or acquit. If you were a notorious merchant, cutting corners and skating on thin ice, the court might be inclined to say, "You intended to do it forthwith." But if you were a reputable person in the community, I think the court would give you the benefit of the doubt. In this case we should perhaps place reliance on the courts.

The Chairman: We would have to rely on the courts and the courts' interpretation. The question is what interpretation would the court make? We are dealing at this stage, with a summary prosecution. We are dealing at the level of a magistrate. I am not reflecting on magistrates, but knowing their work load and how quickly they dispose of perhaps 50, 75 or 100 cases in a morning, there is not time for any study of or reflection on the wording. They expect the legislation to mean exactly what it says.

Senator Flynn: Mr. Chairman, you are coming back to the distinction made last week between magistrates and high court judges!

The Chairman: Shall we move on to the next point?

Mr. Cowling: I am curious to know why the "due diligence" section has not been made applicable to section 36.2, which is the offence of double ticketing. Was that considered, Mr. Minister?

Hon. Mr. Ouellet: Yes. In practical terms, how can you make an honest error there? The double ticketing says that it is the lower of the two prices. Obviously if it is the lower of the two prices there is really no offence.

Mr. Cowling: If someone pasted a higher price over a sticker that has a lower price, you have committed an offence. The consumer could possibly insist on paying the lower price, but has not the offence been committed?

Hon. Mr. Ouellet: At page 33 of the bill it says:

Il est interdit à qui que ce soit de fournir un produit

It is not the fixing; it is the selling. So there is no offence.

Senator Flynn: If you refund the money, possibly no action would be taken.

Mr. Cowling: Would it be possible for an employee, who is going around with a stamp, to make a mistake in the right figure?

Hon. Mr. Ouellet: But, in fact, the correction would take place in the store. The cases where it could go to court are very rare, because obviously those questions would be settled.

Senator Flynn: It is only if you refuse to refund the difference that a case could be made.

Hon. Mr. Ouellet: That is right. If you refuse to refund, you cannot plead due diligence.

Mr. Cowling: The other section to which the committee recommended the defence should be applied is section 35, the proportional allowances section. I wish to point out the reason for that is because it was perhaps not made too clear at the time. Section 34, which is the price discrimination section has, in a way, *mens rea* built into it, because the word "knowingly" appears in it. Section 35, which is a similar type of section, apparently does not contain that word.

Senator Desruisseaux: On which page is section 35?

Mr. Cowling: I do not think section 34 appears in the bill, because it has not been amended. If anyone has the blue book, it appears at 41E of that book. Section 35 has not been amended by the bill, except to make it apply to services as well as articles. The word "products" therefore appears.

Hon. Mr. Ouellet: Here again, it is very difficult to plead honest error in this case, because obviously there is an agreement between two persons or two firms. It is an agreement between the two, otherwise it does not take place.

Mr. Cowling: On the other hand, for the offence under section 34 to come into play there must be a knowing discrimination.

The Chairman: Except that in such a transaction both parties would have knowledge of what they were doing, because it is a form of understanding, or agreement that they have arrived at, is it not? So there is knowledge inherent in the subject matter.

Mr. Cowling: It is the supplier who is giving the allowance and he must do it on a proportional basis. I suppose the difficulty is that in deciding the right proportion, an honest error might be made. Therefore he should have this defence available to him.

Perhaps we need not spend too much time on it. It was a representation that was made to the committee in a very strong brief, and I thought some explanation of it was warranted.

The Chairman: We have had the explanation. Let us move on to the next point. We had some discussion in committee, and the point was raised in a number of briefs, about the constitutional aspects. The question is how far should we go with that. My reasoning does not take me to the extent that I accept everything I read on the question of whether there is a right to raise the constitutional issue. That right is inherent in Parliament and in the Senate. If it is felt that something as proposed is not valid legislation, we can take steps to refuse to pass it. The question whether we can say that the effect of the section is suspended until such time as there is a pronouncement by the Supreme Court of Canada as to the constitutionality, is a different one.

First of all, there is the question as to whether we should invoke it. There has also been the question raised in the other place as to whether there is any right to invoke it.

The next question, and the main question, to my mind, is the seriousness of the intrusion into the field of constitutionality. I think there may be one area, at least, where the question of constitutionality would appear to be pertinent, and that is in relation to the section which proposes to make the Federal Court the trial court in respect of these criminal offences.

Senator Flynn: Or even the civil actions.

The Chairman: I am talking about criminal prosecutions in the Federal Court. The constitution of criminal courts under the British North America Act lies with the provinces, and one of the suggestions made by this committee—and we had this in mind—was that the prosecution of criminal offences should be left to the criminal courts which have been constituted by the provinces. We think that is one question that should be looked at. Have you any comment on that, Mr. Minister?

Hon. Mr. Ouellet: First of all, Mr. Chairman, I want to say that adding all new indictable offences to the list of offences triable by the Federal Court is merely a continuation of the present policy under the Combines Investigation Act which was enacted in 1960. Under that policy, and for the last 15 years, the Federal Court has had jurisdiction to try indictable offences under the Combines Investigation Act. This new provision merely adds all of the new offences to those that are already tried in the Federal Court.

The Chairman: The individual still has the option as to what court he wishes to be tried in. He may elect to be tried in the criminal court of the province or in the Federal Court, but he does have some right of selection. Whether the federal authority has the right to provide that option is another question. Corporations, however, do not have any option. If they are being prosecuted for one of these offences, they have to face that prosecution in the Federal Court, although it would appear from the history of prosecutions in the last number of years that many of them have been tried in the criminal courts of the respective provinces.

Hon. Mr. Ouellet: First of all, I think I can safely say that the federal government has no doubt as to the constitutional validity of granting this jurisdiction to the Federal Court, or to the constitutional validity of the bill in its entirety.

Senator Flynn: I would have been surprised had you said anything else.

Hon. Mr. Ouellet: The Federal Court has been granted jurisdiction in certain areas of the criminal law and there have been no objections on constitutional grounds so far.

Mr. Cowling: But has it not always been by consent thus far? I am aware that there have been cases prosecuted in

the Federal Court against corporations, and perhaps even against individuals, but always with the consent of the corporation or individuals involved.

Hon. Mr. Ouellet: Yes. I am afraid I cannot agree with the proposal that corporations should be allowed to object to prosecution before the Federal Court simply because the Federal Court ordinarily does not deal with criminal law matters and may not be as fully acquainted with the criminal law as are the provincial courts.

The reason for requiring consent in the case of individuals is that compulsory trial before the Federal Court would deprive the individual of his or her right to a trial by jury. The right to trial by jury is a basic principle of our criminal law system and we do not wish to undermine that right in any way. A trial by jury, of course, is not available to corporations. The rationale, therefore, for providing a right to elect to be tried before the Federal Court or the provincial court does not apply to corporations, since corporations may not elect to be tried by a jury in any event.

Mr. Cowling: A corporation, of course, could raise the constitutional issue in the event that it is prosecuted before the Federal Court.

Hon. Mr. Ouellet: Yes, of course.

The Chairman: What is the next item to be dealt with?

Mr. Cowling: I think we have dealt with regulated trades and industries, Mr. Chairman. The next item would be exemption for affiliates. I think the minister is familiar with the recommendation of the committee. It was implemented in large measure by the House of Commons, but it was not made applicable to section 34, which is the price discrimination section, and perhaps we could have a comment on that.

Hon. Mr. Ouellet: As you have indicated, the amendment submitted by your committee in this connection was adopted for the first two sections dealing with combinations and bid-rigging, because we are agreed that it is unrealistic to expect affiliate companies to behave in these areas as though they were independent of each other. However, in relation to price discrimination, that is an entirely different matter. It would be very frustrating and damaging to any independent distributor for one of his suppliers, who is also the parent company of his competitor, to grant to that competitor a preferential price that would make it quite impossible for the independent to be competitive in respect of the retail price.

The Chairman: Are you thinking of service stations and things of that kind?

Hon. Mr. Ouellet: Yes. In some instances, as is the case under section 32 and 32.2, it appears reasonable. I think we have been able to go a little way in adopting this suggestion, and we are quite pleased to accept it. However, we do believe that in other areas it would be a little more difficult to do so.

Mr. Cowling: I do not want to pick on the oil companies, but could they not get around it by simply dissolving their subsidiaries and deciding to operate the gas stations on a direct basis? They could then sell at whatever price they wanted. In other words, it is only the fiction of having another corporation that enables the principle to which you have referred to be applied.

Hon. Mr. Ouellet: Except that we are speaking in speculative terms. You foresee something that might happen, but we could hardly base the legislation on that.

The Chairman: If it is important enough to the oil companies, for instance, in the matter of their present system of operating that they switch from subsidiary companies and carry on the operations themselves, you could expect that to happen, so that the section would become meaningless.

Hon. Mr. Ouellet: Except it does not apply only to this group, it has wide ramifications.

The Chairman: There may be some instances where the subsidiary vehicle would not be available for many reasons, maybe reasons related to liability. I do not know.

Mr. Cowling: One difficulty I have with this section, Mr. Minister, is that it seems that it is not encouraging the lowest possible price to the consumer. I know that that is considered important by you. It is certainly considered to be important with respect to the discussion that loss leadering was not a good practice, nevertheless it got goods into the hands of the consumer at a lower price and, therefore, it ought to be left alone.

It seems to me that some of the same reasoning might apply to this section 34. If you allow the subsidiary to get it at a lower price, then the consumer may get it at a lower price too.

Hon. Mr. Ouellet: I do not want to duck the question at all; quite the contrary. It is an important area. It is public knowledge that in phase two we will be dealing with loss leading. I have indicated this in speaking to the other place that this would be one of the subjects of study and action in phase two. We will also be dealing with price discrimination in phase two. We will come back to the subject at that time.

The Chairman: All right. Would you make a note of that Mr. Cowling? What is the next subject matter?

Mr. Cowling: The next point in the order of the report would be sport. The committee's recommendation was that those provisions be removed entirely. There has been an amendment exempting amateur sport, but only in a qualified way.

I was interested to note that the Amateur Sports Association made representations to this committee and also made representations to the Commons committee after the amendment had been announced. From my reading of their brief, they did not appear to be too happy with the amendment that was made.

The Chairman: That is, with the definition of "amateur".

Mr. Cowling: That is correct. They pointed out that there are not very many amateurs, in the sense that they get absolutely no remuneration or fringe benefits whatsoever. This cuts down the application considerably.

Senator Molson: I might put that a little differently and say that there are practically none that would fit that definition; they are almost non-existent.

Mr. Cowling: They suggest another amendment, but it was not adopted.

The Chairman: Do you have any comment, Mr. Minister?

Hon. Mr. Ouellet: First of all, here again we are confronted with this decision to include services under the Combines Investigation Act because of this section 32 which includes services. Under the act, without any further section in the bill, that would have meant that all sports would have come under the Combines Investigation Act; professional leagues or amateur leagues, or any organization of sports would have been prohibited.

Obviously, it was unacceptable to completely prevent any arrangement because otherwise there would be no leagues or clubs or activities at all. This is why the bill has allowed section 32.3 to exist as a qualification of section 32, in order to permit certain arrangements to take place in relation to professional sports.

Section 32.3 at page 28 of the bill is there, not to prevent anything but to permit arrangements in professional sports, in order to allow clubs to operate and to allow leagues to operate. It also takes into account the international aspect of these organizations.

We have to start with this very different perspective. In the first place, everything would have been coming under the new provision dealing with services and, recognizing that we should not tamper with sports activities, section 32.3 was drafted to allow some flexibility and some arrangements to take place.

In the course of discussions, representations were made to have a clause that would say both professional and amateur sports would be excused. There is a series of reasons for amateur sports being excused. Surely people who are freely helping small children organize themselves to play hockey in every parish across Canada should not fall under the possibility of having criminal sanctions. Therefore, all amateur sports were excused.

One of the difficulties with the definition is that there is a difference between amateur sports, in the sense of the law, and amateur sports as described by the professional or amateur association.

It is quite clear that the Junior A, which call themselves amateurs, according to this legislation are not amateurs. I do not think we wanted at the time—I think it was clearly expressed in the other place—to have hockey activities at the junior level included. However, they are so organized that even if they call themselves amateurs, they are not amateurs, they are professionals. So, according to this legislation they are not excused by the act because they are treated as professionals. There is this first difference.

The Chairman: They have to meet the exemptions.

Hon. Mr. Ouellet: That is right. The reason we have not excused the professional is that the government had to look at whether or not there were reasons why this exemption should be made. The government's fundamental decision was that all services of a commercial nature should be subject to the general rules of the competition policy.

Whether professional athletes are regarded simply as members of a new kind of profession, or whether professional sports are simply regarded as one branch of the entertainment industry, there appears to be no logical ground for differential treatment, much less for a complete exemption from the legislation.

It is true that on the basis of this logic, the government could have omitted section 32.3 altogether. The provision in section 32 is against agreements or arrangements to lessen competition or to restrict or injure trade or commerce. The provision would apply with full rigor against those arrangements which are common in professional sports. This is why we have drafted section 32.3 as an exempting provision. It recognizes the international nature of professional sports and the need to maintain a reasonable balance among teams. The section, therefore, moderates the rigor with which the conspiracy provisions would otherwise apply in this field.

I wish to say to the members of the committee that I fully understand that this legislation is possibly not the ideal vehicle for dealing with sports. Surely the ideal situation would be to have specific legislation with respect to sports. The government has asked, in fact, on three different occasions groups to carry out studies. There have been royal commissions on sports, which came forward with sets of proposals for regulating professional sports activities. Two other reports have been made in the past which arrived at similar conclusions. This is the first occasion on which the government has, through legislation, attempted to establish regulations in the field of sports. Until the government is persuaded that, alone among all services, professional sports should be exempted from competition policy, or until other legislation is proposed to deal uniquely with professional sports, I must say that the government does not seem to be very anxious to modify section 32.3 more than it has been modified so far. We fully realize that possibly it is not the ideal way, again I repeat this, to deal with the question of sports. However, in the meantime we believe that it is one step that had to be taken in answer to these inquiries and commissions which in their reports strongly recommend some regulation in professional sports.

The Chairman: The effect of this might well be to exert some pressure on organized sport to get together on some other organization of sport, rather than face the continued application of this legislation.

Hon. Mr. Ouellet: I fully appreciate that possibly this will generate what I could term a sound reaction on the part of those in professional sports to ask for proper legislation, which could be brought forward at a later date by the Minister of National Health and Welfare, who is responsible for professional sports.

The Chairman: Do you contemplate that under these exemptions and section 32 players could be subject to charges?

Hon. Mr. Ouellet: Yes, they could.

The Chairman: For what?

Hon. Mr. Ouellet: If they combined.

The Chairman: Well, they are no good to the team if they do not combine.

Hon. Mr. Ouellet: No, it depends. The section applies only to restriction of competition.

The Chairman: If players on a team combined to produce the result of the game, that would be an offence under the Criminal Code, in any event.

Hon. Mr. Ouellet: I am sorry; I missed that.

The Chairman: I say that if the players on a team combined and agreed to play in such a manner as to

produce a desired result, whether for betting purposes or otherwise, it would be an offence under the Criminal Code.

Senator Cook: They combine to win.

Hon. Mr. Ouellet: No, they would not be guilty of an offence under this legislation.

The Chairman: No, but it would be an offence under the Criminal Code.

Senator Laird: Surely.

Hon. Mr. Ouellet: Yes; we know that the Government of Ontario is now endeavouring to minimize violence in sports and is applying the Criminal Code.

Senator Molson: Mr. Chairman: I think the point we made earlier, when Mr. Bertrand was present but not the minister, was the fact that this legislation, section 32.3, to some of us seems to be directed at the wrong end of this situation. In my opinion at least, it does nothing to protect the public. It makes it an offence to limit the playing capability of a group of professional athletes. Today we have approximately 30 or maybe 40 professional teams in hockey. If they have an average of 25 players, there are 1,000. We have approximately 18 football teams, which are half Canadian, so there are probably another 300 or 400. That is the group which this legislation has included a section to protect. However, we are not doing anything about the public, which is now paying $12 for a seat which used to cost $5, or a number of other things which in my opinion would make a great deal of sense. Why are we not bothering about the prices in the stadiums and rinks and the $200,000 salaries for fellows who work about six months? In my opinion this is nit-picking; it is just coming in on the surface and having a little stab at professional sport, but it is not doing a single thing, in my opinion, to make the ability of the public to enjoy professional sport better.

Hon. Mr. Ouellet: I fully agree with you, Senator Molson. In my opinion it is quite right to say that this does not go to the heart of the problem. However, the Combines Investigation Act should not be the legislation under which to deal with the heart of the problem. I submit to you that it should be done more properly by another authority, or under another bill. The only thing that this legislation does through section 32.3 is to make sure that we are not, through the Combines Investigation Act, preventing professional sports taking place in Canada. Everyone would object to it if, because the Combines Investigation Act includes services in Canada it would no longer be possible for Montreal or Toronto teams to assemble a group of players into a team playing in a league and make arrangements and regulations for the playing of hockey, football or other sports. Therefore, section 32.3 allows for some agreements or arrangements to take place to permit professional leagues to exist, and that is all it does.

Senator Molson: Yes, but in the meantime the price of professional sport, with all the benevolent background of attempting to assist the public to enjoy the sport, has gone right out of the window. Part of this nonsense is the price paid for hockey players when the WHA came into existence. If this thinking had not existed at that stage, then players would have had very considerable difficulty in obtaining $1 million for signing and $200,000 a year for so many years. In my opinion, this is one of the things that is really acting to the disfavour and detriment of the public. I mean, what is generally happening in the field of sports.

Hon. Mr. Ouellet: Yes, but I think you will agree with me that it is not through legislation dealing with various specific commercial activities that we should deal with this problem which you have described. It would be more appropriate to have officials and those who are involved in sports activities to come forward with a proper set of proposals and proper schemes, to use your words, to put some order into the field and give more protection to the public. What we are doing in this legislation is to acknowledge that because of section 32, and the fact that we have now put services under the Combines Investigation Act, we have had to give certain exceptions to professional sport and their arrangements concerning leagues, and so on; otherwise there would be no leagues, the leagues would not be exempt.

Mr. Cowling: That is the positive side of the amendment, I appreciate that; but it seems to me that the tailor-made exception has a greater impact than would be the case if section 32 were left alone.

Hon. Mr. Ouellet: Oh no. If you do not have section 32.3 it means that the very fact that the officials of the leagues get together to limit the movement of players, or the agreements concerning teams, is an offence under the Combines Investigation Act for conspiracy or agreement. Obviously that is stretching the Combines Investigation Act a little too much. That is why we have exempted entirely amateur sport. We have described what could be an exemption for professional sport.

The Chairman: In looking at this section, it seems as though you have the public interest in reverse.

Senator Molson: That is my point.

Hon. Mr. Ouellet: Yes and no. We have the public interest in mind in placing an exemption on amateur sport, because the public is very much interested in amateur sport.

The Chairman: What amateurs will they see?

Hon. Mr. Ouellet: They not only see but they also participate. Sometimes it is a family affair or it involves friends. There is a great involvement there.

The Chairman: Is the justification for this, then, that families will stick together?

Hon. Mr. Ouellet: In certain parts of Canada yes. There is strong family interest in teams, and so on. Secondly, professional sport activity is allowed under section 32.3 so long as it is within certain limits. Because there is some limitation, there is public interest and protection. I grant that it does not go as far as some members of the committee would like, but this is not the proper place to deal with it.

Senator Laird: Then why deal with it here at all?

Hon. Mr. Ouellet: We have to, otherwise sport would not be allowed.

The Chairman: Mr. Minister, you said that these sections allow for professional sport. Professional sport does not need any statute in order to exist. These sections say that if you operate in a way that would violate section 32, you may be charged under this bill. It depends on how you operate whether or not you enjoy an exemption. This bill is one that tolerates professional sport, but professional sport can operate without the bill.

Hon. Mr. Ouellet: Yes, except that organized sport, of the kind we consider a service, would have to fall within the provisions of this new bill.

The Chairman: You could not violate the provisions of this bill. It is not a case of having to conform to the provisions.

Senator Molson: Why could not the section merely have said "sport" rather than "amateur sport"?

Mr. Cowling: That seems to be the question, whether it is advisable to take "sport" right out of section 32.2 A case could be made that without special exemption it could be covered by section 32 of the act.

Hon. Mr. Ouellet: My answer to that is the one I gave earlier. This government is on record to do something along these lines. Three commissions have brought forward recommendations that we establish some rules for professional sport. It would be a complete about-face if we did not at least take these first steps. I submit that it may not be the complete answer or an ideal one, but I say that it should be considered as the first step until further legislation is proposed to deal more adequately with professional sport.

Senator Macnaughton: The concern of many members of the committee is that they feel that this section creates a preferred class. It is an attempt, yes, but it does not solve anything. However, you do get marks for trying.

The Chairman: It does create a preferred class. There is no doubt about that. It provides exemptions that might not be provided in the case of other service operations.

Hon. Mr. Ouellet: That is right, yes. That is why I have outlined the positive aspects of the clause.

The Chairman: But we have to look at the question of services in relation to the whole bill. If, in dealing with sport, it is treated as a preferred class, perhaps others should be treated as preferred classes.

What items are left to discuss?

Mr. Cowling: Interim injunctions; civil damages, where the proposal was to change the definition of record of proceedings. We have a number of items under the reviewable practices jurisdiction, although many of the Senate's suggested amendments were adopted in one way and another by the Commons. Perhaps the most important matter left is the one dealing with appeals from the orders of the commission.

The Chairman: You have a record of those items, Mr. Minister. This is a good time to adjourn. We will be sitting again this afternoon, although not on this bill. We shall be sitting at 2.30 to deal with bankruptcy bill.

At one stage I was bold enough—although I have now lost some of that boldness—to consider making the suggestion that we might think about sitting this evening. It will depend on how far we progress on the bankruptcy legislation this afternoon. Our objective is to make a report before the Christmas recess. We may feel that we have sufficient time to deal with it. That point will be left in abeyance.

It is proposed that we sit tomorrow morning if the income tax bill is referred to committee this afternoon. With regard to the income tax bill, there is the question of the availability of certain witnesses from the Department of Finance. They may not be available. I told the departmental officials, "This is your bill. We offer you the ability to expedite it, and if you are not ready to take advantage of it, the sin is on your head. It cannot be said that we have slowed the process."

The intention, if carried out, is that Tuesday, Wednesday and Thursday of next week will be available, which may necessarily mean that the Senate will sit on Monday night to leave Tuesday, Wednesday and Thursday available. I suggest we hear from the minister, because we must move this bill along—it is a public bill and an important one—and be ready to report on it before the Christmas recess.

The suggestion I make is that if it is available to this committee to sit on Tuesday morning, assuming the minister is available at that time, we will sit on Tuesday morning at 9.30. If it is not possible for the committee to sit because of some rule of the Senate, then we will sit on Wednesday morning, or Wednesday afternoon, whichever suits the minister, to finish off these items.

Perhaps you could tell us in the meantime when you will be available, Mr. Minister, and certainly by tomorrow I should be able to tell you whether we will sit on Tuesday morning or Wednesday morning.

Hon. Mr. Ouellet: I would be willing to come on Tuesday morning, if that is the wish of the committee.

The Chairman: I know that would suit you better, and we will endeavour to meet at that time.

The committee adjourned.

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1974-75

THE SENATE OF CANADA

PROCEEDINGS OF THE
STANDING SENATE COMMITTEE ON

BANKING, TRADE AND COMMERCE

The Honourable SALTER A. HAYDEN, *Chairman*

Issue No. 62

WEDNESDAY, NOVEMBER 19, 1975
THURSDAY, NOVEMBER 20, 1975

Ninth Proceedings on:

"The *Subject-Matter* of Bill C-60, Bankruptcy Act, 1975"

(Witnesses: See Minutes of Proceedings)

29738—1

THE STANDING SENATE COMMITTEE ON BANKING, TRADE AND COMMERCE

The Honourable Salter A. Hayden, *Chairman*

The Honourable Senators:

Barrow
Beaubien
Buckwold
Connolly
(*Ottawa West*)
Cook
Desruisseaux
Everett
*Flynn
Gélinas
Haig
Hayden
Hays
Laird
Lang
Macdonald
(*Cape Breton*)
Macnaughton
McIlraith
Molson
*Perrault
Sullivan
Walker—(19)

**Ex officio members*

(Quorum 5)

Order of Reference

Extract from the Minutes of the Proceedings of the Senate, May 13, 1975.

"The Honourable Senator Hayden moved, seconded by the Honourable Senator Bourget, P.C.:

That the Standing Senate Committee on Banking, Trade and Commerce be authorized to examine and report upon the subject-matter of the Bill C-60, intituled: "An Act respecting bankruptcy and insolvency", in advance of the said Bill coming before the Senate, or any matter relating thereto; and

That the Committee have power to engage the services of such counsel, staff and technical advisers as may be necessary for the purpose of the said examination.

After debate, and—
The question being put on the motion, it was—
Resolved in the affirmative."

Robert Fortier,
Clerk of the Senate.

29738—2

Minutes of Proceedings

Wednesday, November 19, 1975
(80)

Pursuant to adjournment and notice the Standing Senate Committee on Banking, Trade and Commerce met this day at 2:30 a.m.

SUBJECT: "The *Subject-Matter* of Bill C-60, Bankruptcy Act, 1975".

Present: The Honourable Senators Hayden, (*iChairman*), Barrow, Beaubien, Buckwold, Cook, Desruisseaux, Everett, Flynn, Lang, Macnaughton, McIlraith and Walker. (12)

In Attendance: Messrs. David E. Baird and Melvin C. Zwaig, Advisors to the Committee.

Witnesses:

Dept. of Consumer and Corporate Affairs, Bankruptcy Branch:

Mr. John Howard, Assistant Deputy Minister;

Mr. R. Landry, Superintendent of Bankruptcy;

Mr. Arnold Landis, Assistant Superintendent,

Private Administration;

Mr. Yves Pigeon, Assistant Superintendent,

Federal Administration;

Mr. René Cyr, Assistant Superintendent,

Detection & Investigation; and

Mr. R. Théberge, Detection & Investigation.

Dept. of Justice; Bankruptcy Section:

Mr. Moe Prabhu, Senior Legal Advisor;

Mr. Steve Kleiner, Legal Counsel; and

Mrs. Jacqueline Dubois, Legal Counsel.

The Committee then proceeded to further examine the said Bill together with the assistance of the witnesses.

At 4:20 p.m. the Commission adjourned until Thursday, November 20, 1975, at 9:30 a.m.

Thursday, November 20, 1975
(81)

Pursuant to adjournment and notice the Standing Senate Committee on Banking, Trade and Commerce met this day at 9:30 a.m. to further examine the above subject.

Present: The Honourable Senators Hayden, (*Chairman*), Barrow, Beaubien, Buckwold, Cook, Desruisseaux, Everett, Flynn, Lang, Macnaughton, McIlraith and Walker. (12)

In Attendance: Messrs. David E. Baird and Melvin C. Zwaig, Advisors to the Committee.

Witnesses:

Department of Consumer and Corporate Affairs; Bankruptcy Branch:

Mr. John Howard, Assistant Deputy Minister;

Mr. Raymond Landry, Superintendent of Bankruptcy;

Mr. Arnold Landis, Assistant Superintendent;

Mr. Yves Pigeon, Assistant Superintendent; and

Mr. René Cyr, Assistant Superintendent.

Department of Justice; Bankruptcy Section:

Mr. Steve Kleiner, Legal Counsel.

The Committee continued its examination of the above subject.

At 11:50 a.m. the Committee adjourned to the call of the Chairman.

ATTEST:

Frank A. Jackson,
Clerk of the Committee.

The Standing Senate Committee on Banking, Trade and Commerce

Evidence

Ottawa, Wednesday, November 19, 1975.

The Standing Senate Committee on Banking, Trade and Commerce met this day at 2.30 p.m. to consider the subject matter of Bill C-60, respecting bankruptcy and insolvency.

Senator Salter A. Hayden (*Chairman*) in the Chair.

The Chairman: Honourable senators, we have present Mr. Raymond Landry and Mr. John Howard. We have the backup cast, a sturdy reinforcing group, in case their help should be needed, although our questions are usually so carefully worded they present no problems.

Mr. Baird, will you or Mr. Zwaig speak first?

Mr. David Baird, Adviser to the Committee: I have discussed with Mr. Howard various topics that we would like him to deal with. The first topic we though we should discuss today was the issue involving the priority of wage earners. This is a topic we previously discussed in committee.

The provision applicable to the priority for wage earners is set out in clause 238 of Bill C-60. Basically it has a provision whereby a claim for wages up to $2,000 has priority over all other secured creditors.

Mr. Howard, would you discuss this provision, the reasons for it and what changes it will impose on the present system?

Mr. J. L. Howard, Assistant Deputy Minister, Department of Consumer and Corporate Affairs: I will certainly begin the discussion, Mr. Baird, but I will ask Mr. Landry to go into greater detail.

The motives for this were two-fold. First, the secured creditors are now largely outside the Bankruptcy Act, and realize their security interests before the trustee of the estate can even consider the properties that are subject to the security interests. Most estates, even fairly large commercial estates, have few assets available to even preferred creditors and, of course, even less for unsecured creditors.

When we first considered this policy we looked at two alternatives. The first and the most attractice to all involved was some kind of insurance scheme. We felt, however, that to set up an insurance scheme to ensure that any arrears of wages remaining outstanding in case of a bankrupt firm would be paid to the wage earners was too complicated a system, given the relatively small amount of the aggregate claims of all wage earners against estates in any one year. The other alternative was simply to deem a wage earner to be a secured creditor, in effect, with absolute priority over other secured creditors, what is known as super-privilège in French. He would therefore be able to realize, directly or indirectly, out of the assets of the estate even before the secured creditors realized.

Since that time we have carried out considerable further analysis and Mr. Landry has actually visited the administrators in Paris, France, and in London, England, to discuss the problem with them. He found in England that they are currently working on an insurance bill which will provide insurance to resolve this problem of wage-earner arrears in respect of insolvencies.

The Chairman: Who pays the premium under that bill?

Mr. Howard: Under that bill I believe the employers pay all the premiums. To put the premium problem in perspective, we did some rule-of-thumb analysis and found that with a work force of nine million in Canada, if we have a contribution of 10 cents per week in respect of each employee, we come up with a fund of approximately $40 million a year, which we feel is considerably in excess of what is required to resolve this problem. However, as a result of the visits of Mr. Landry, particularly in Paris, we found that there was, no doubt, a very serious weakness in our analysis of the data. They found in France that, although there were not many claims for wage arrears before they had the insurance, once an insurance system was set up the number of claims increased very dramatically. There are, of course, differences between the French model, the proposed English model and anything we might recommend. First of all, the French system is very generous toward the wage earner in terms of severance pay in the event of forced termination of employment and in respect of insolvency. They place no ceiling whatever on the amount of arrears that a wage earner can claim. In addition, I believe, in contrast to our system, they do not impose personal liability on directors and officers of corporations with respect to wage arrears. As a result, there is almost a built-in incentive when a company is becoming insolvent for the directors and officers to attempt at any cost to keep it alive, including financing the on-going operation on the backs of the wage earners, on the assumption that they will be paid out of the insurance system anyway.

At the present time we are reconsidering and submitting to our minister the results of the more recent analyses we have carried out with respect to wage-earner insurance. No decision has been made with respect to this but, because of the comments made about this in this committee and the comments that we have received from others, obviously we must get into this in great detail.

If you would like to know a little more about the English and French bills, I suggest that Mr. Landry could give you a few details. Would that be useful to you, Mr. Baird?

Mr. Baird: Yes, I believe it would.

Mr. Raymond Landry, Superintendent of Bankruptcy, Department of Consumer and Corporate Affairs: As Mr. Howard has just pointed out, in both England and France—I understand, also, that Germany has just passed

similar legislation—the contributions are required from employers. The system—the only one that I know of that is now functioning is the one in France—provides that very soon after any insolvency situation the person in charge of the liquidation, be it a trustee, a sequestrator, or liquidator, is responsible for filing with the fund a statement of the oustanding claims, as he can determine them at that moment, within 10 days of the bankruptcy. Within five days of that filing a cheque is issued to the trustee for distribution to the wage earners. This covers only a portion of the total claim that a wage earner may have against the bankrupt.

The Chariman: Does the 10 cents collected per person constitute a trust fund?

Mr. Landry: It is administered by what is known as UNEDIC in France, which is similar to the Unemployment Insurance Commision here. However, they have a special fund set aside specifically for wage earners' claims in the case of insolvency.

The Chairman: Who administers that? Is there representation by the employers and employees?

Mr. Landry: No; the responsibility is on the employers to set up that scheme. That is under French law.

The Chairman: And I assume to invest into it, also?

Mr. Landry: To invest into it; they are responsible for collecting and they have delegated that task to the UNEDIC which is comparable to our UIC. They are the ones who may give directions as to the amount of the levy from all employers in France and have a general functional supervision over the administration of the system; but it is done through local agencies.

Senator Beaubien: Is it only the employers who contribute?

Mr. Landry: Only the employers. The same thing, I understand, although I have not received any reports as yet from Germany, is being established there. In England the bill was tabled in the house some months ago, I believe some time in April of this year, but I did not receive any news as to the actual implementation of the scheme. All those countries are attempting to provide a fund that will quickly, after an insolvency, reimburse the employees of at least part of their outstanding claims. In France, as Mr. Howard has pointed out, all the claims would eventually be paid, but within 10 days the trustee is required to pay out the super-privilège portion of that claim, which amounts to some $33,000 francs, which is close to $8,000. All that is outstanding must be paid, but there is a further delay. Within six months after the bankruptcy the trustee must file with the fund a final statement of claims on behalf of all employees, indicating the total owed to them, which may include pension funds, severance pay, and any type of benefits related to wages.

Senator Cook: Up to $8,000?

Mr. Landry: No; that is up to the total amount of the claim, but within six months. The wage earner must be paid up to $8,000 within 15 days of the insolvency.

The Chairman: Do you mean that is paid to each employee?

Mr. Landry: To each employee.

Senator Macnaughton: The fund operators would be responsible for re-investment of funds, I take it, and all administration?

Mr. Landry: Yes.

Senator Macnaughton: Did you get any idea as to the size of the administration?

Mr. Landry: The number of people involved?

Senator Macnaughton: Yes?

Mr. Landry: For example, in the Paris region, which is the one I looked at and which is responsible for more than half of the claims which have been filed and also half of the employers contributing to the fund, they have five people working full time for that specific part of their operations. However, they can draw on the other part, which is the unemployment insurance scheme, for which they are also responsible. They told us that they did not need very many people, but they needed sophisticated people to be in a position to discuss with the trustee as to the rightfulness of the claims that are filed. However, the way they do it is France is to pay out without questioning, and then have spot checks on the reliability of the claims that had been filed up to that time.

The Chairman: I take it the company, which is the employer, makes contributions to an employee's pension fund, and the same body collects the contributions as a protection for default in payment of wages. Is that right?

Mr. Landry: The employers are required to pay into the unemployment insurance fund a certain amount. I think also that the employees must contribute to that fund, but separate and apart. Even though it is administered by the smae body, they have set up this separate fund to which contributions are received from the employers only.

The Chairman: And whether the industry involved is nationalized or is a private enterprise, the obligation to provide those moneys still exists?

Mr. Landry: That it a little difficult to answer because the French law is very complicated in that respect. It seems to me, from what I could gather from my study of the French system, that only those employers who are part of an association of employers are called upon to contribute to the fund. I think it excludes public bodies, but I am not sure.

The Chairman: Does it mean that I can avoid my obligation as an employer if I do not belong to that association of employers?

Mr. Landry: Even if the employer does not contribute to the fund, the employees are covered.

The Chairman: From where does the coverage come?

Mr. Landry: From the fund.

The Chairman: But someone has to put something in, in order that there might be something to take out.

Mr. Landry: Yes. For example, I understand that no employer having less than 20 employees is required to contribute; but those employees would nevertheless be covered by the fund.

Senator Laird: Isn't Renault or Citroen a publicly owned company?

Mr. Landry: I think they would be obliged to contribute to the fund, but not the French government, for example, for its public servants.

Senator Laird: Am I right in thinking that Renault would be treated as if it were a private enterprise organization and the company would have to come through with a percentage?

Mr. Landry: I would not venture to answer that question, because I do not know. I would like to check on that.

The Chairman: It is an outline of a method. We have discussed it here.

Senator Cook: What about the U.K.?

Mr. Landry: In the U.K. no scheme is in operation at this time. Their proposed scheme is similar to the one in France, except that the coverage is limited to a fixed ceiling. That is a feature that was recommended we should have in our system if ever we set one up.

The Chairman: The coverage is likely to be a percentage of earnings, but it is not necessarily the amount of wages one was receiving at the time of the default.

Mr. Landry: It would be a ceiling, including not only outstanding wages but also related benefits.

The Chairman: If your wages at that time were $100 a week, it would not necessarily mean that the fund would pay you $100 each week; it would be a percentage of that.

Mr. Landry: It would not cover any future earnings, but only earnings outstanding on the date of insolvency—in back wages.

The Chairman: Yes, but would it provide for the full coverage and payment of those amounts?

Mr. Landry: Up to a certain ceiling.

Senator Cook: What is the ceiling?

The Chairman: I am looking for the answer.

Mr. Landry: There is no ceiling in France, but they are contemplating a ceiling in the U.K. system. They also have a ceiling in the German system.

The Chairman: In the English system the arrears might be accumulating at the rate of $100 a week. If the ceiling is $50, I would have to accept $50 a week in satisfaction of what the company owed.

Senator Cook: Is the ceiling global in the aggregate?

Mr. Landry: Yes, it is global in the aggregate.

Senator Cook: How much is it in the U.K.?

Mr. Howard: It is as much as £400, but we are not certain.

Senator Cook: The ceiling is in the order of £400 or £500?

Mr. Landry: That is the status now. At the same time as they were setting up the scheme, they were revising the Bankruptcy Act and they wanted to raise this amount.

Senator Cook: Two thousand dollars is probably not too much for the U.K. system.

Mr. Landry: That is right. It might come close to $2,000 or $3,000.

Mr. Melvin C. Zwaig, C.A., Adviser to the Committee: What happens with the amount of money owed in excess of that ceiling? Do they rank as an unsecured creditor of the bankrupt's estate?

Mr. Landry: Yes, they do rank as unsecured creditors for any remaining part of the outstanding claim at that time. It must be pointed out that in France, England and Germany the fund is subrogated to the rights of the employees. That is to say, the fund is given the right to claim as a preferred creditor, the same right that the wage earner has under the Bankruptcy Act in those countries.

Mr. Zwaig: So there is a right of recovery?

Mr. Landry: Yes.

Senator Buckwold: I am interested in Mr. Howard's comment about the abuses that are built into the system. We have gone through this exercise with unemployment insurance, where we find people drawing unemployment insurance who never did so before. Can you tell me what is the experience in France or other countries with regard to padding the payrolls and the variety of other abuses that could appear—particularly the one where a company, knowing it is going to be bankrupt, and knowing that its workers are protected, can almost gauge when to stop paying and can use the fund for other purposes? I am worried about the abuses in a system like this.

Mr. Landry: That is one of the drawbacks of the system in France, and of any system that would be set up to cover outstanding wages. There is certainly a temptation on the part of a failing firm to try to postpone as much as possible its eventual downfall. If they have a pool of assets on which they can draw, it is possible they will do the same thing here in Canada.

Senator Buckwold: If we went into something like this, wouldn't we see the same thing as we have with medicare and unemployment insurance—with all kinds of schemes that exist to protect the public under circumstances over which they have no control? The abuse of it soon becomes apparent and we create for ourselves another nightmare.

Mr. Landry: That is why it is absolutely necessary to have a ceiling. It was suggested to us in those countries that a maximum ceiling be set on the claims of wage earners. That could be a safeguard built into the system.

Senator Buckwold: Once you set a ceiling you also set that as the minimum in many cases.

Mr. Howard: I underlined earlier that under our system directors and officers are personally liable for wage arrears, and presumably they will continue to be personally liable in those circumstances. That would be a very important brake on that kind of abuse.

We feel that if it is absolutely unqualified, it would be too serious a sanction because it builds a strong incentive in the act. As soon as you think a corporation might be insolvent, you just close down the business. We think a reasonable balance could be achieved in this system.

In addition to the ceiling that Mr. Landry mentioned, I should say that normally all these claims are processed through a trustee who manages the estate. As trustee he scrutinizes very carefully all of those claims, which is an

important safeguard to ensure there is no padding of the payroll or anything like that.

Senator Cook: If a company has $1 million in assets at the time it becomes insolvent, and owes $2 million in wages, is the $2 million in wages paid out of the insurance fund and the $1 million left in the company, or does the first $1 million in wages come from the company?

Mr. Landry: The first $1 million under the French system should come, theoretically, from the company.

Senator Cook: Therefore, the creditors have no interest in this at all. It would only be for the benefit of the employees.

Mr. Landry: Yes.

Mr. Howard: With respect, I do not think that should be cause for despair. Once the wage earners are paid out of the insurance fund, then the insurance fund is subrogated to a preferred position. You may take the point of view that it would be better to put them down to a deferred position, because all employers throughout the system are contributing to this, and probably the claims will not be so large that the contributions into the fund would amount to a great burden. Quite frankly, from our selfish point of view, we would like to see something left for the unsecured creditors so that they play an active part in the administration of the bankrupt estate.

The Chairman: There might be a lot of other unsecured creditors and you could not get a preferred position as among the various unsecured creditors.

Mr. Howard: Right now, a claim in respect of wage arrears is a preferred claim; that is, preferred above ordinary unsecured creditors.

The Chairman: But I am talking about a situation where a company has failed and where there is an accumulation of back pay. You would then have this fund which was created by the contributions of employers. If in respect of any balance the employees are not paid out of that fund, they then rank as unsecured creditors, are you not creating a separate class, a preferred class of unsecured creditors?

Mr. Howard: That is implied in the bill now. As Mr. Landry said, in the proposed English system, after the fund has paid the wage arrears it is subrogated to the preferred claims of the wage earners over the other unsecured creditors. That, perhaps, should be varied, if it detracts from the overall system that would be desirable for Canada.

The Chairman: What should the preference be, then?

Mr. Howard: What it does, in effect, is keep down the requirement for further premiums for the fund. The question then arises as to whether we are interested in getting more money into the hands of unsecured creditors or keeping down the premiums.

The Chairman: The fund is built up by the employers only.

Mr. Howard: That is correct, but presumably that would be a wide group.

The Chairman: The assets in the estate are the assets of the employer. Now what you are going to do is play games—that is, the fund pays a certain amount to the employees and then the employees would rank as secured creditors in respect of any balance still owing.

Mr. Howard: As preferred creditors.

The Chairman: As preferred creditors, yes. I understand that the employees would be unsecured creditors as well.

Mr. Howard: Yes.

The Chairman: Is that not giving the employee the best of three or four different wolds?

Mr. Howard: Not necessarily; there might be a tremendous deficiency.

The Chairman: Make it the best of two different worlds, then.

Mr. Howard: Certainly, he is getting the first kick at the can, because the insurance fund is there and, presumably, he is going to get 100 per cent of it. The question then is: If the insurance fund is then subrogated, how much is it going to recover out of the estate? That is a value judgment.

Senator Cook: Even though this is a very meritorious scheme or proposal, the only people really interested in it are the employees. It will not do very much for the creditors, and certainly not for the ordinary creditor.

Mr. Howard: As I mentioned earlier, if the real choice to protect the employee is between what we have in this bill and an insurance scheme, then the insurance scheme is very much the preference of the creditors.

Mr. Baird in his first question requested that we comment on the effects of these two alternatives. What we have in this bill will, of course, place in doubt every secured financing in Canada. We are quite aware of that. However, because of our original analysis of the data, we characterized it, essentially, as a minor problem, because from the data that we had in our files it looked like this matter of wage arrears, in aggregate, would be a relatively small amount. However, after looking at the French experience, notwithstanding that we are imposing personal liability on directors and officers, we feel that it could be a much more substantial amount than we originally forecast. For that reason, we are uneasy about the provisions in this bill, and we loan, as the committee itself did in an earlier session, towards an insurance scheme, if one can be designed to balance everyone's interests. The insurance scheme would provide the desired protection for the wage earners and yet would not detract from the rights of the secured creditors. It is also hoped that an insurance scheme would achieve a better balance and a more workable system in general.

Mr. Zwaig: If we accept the premise of an insurance scheme, and also take into consideration that the bill proposes to do away with the Crown priority, may I have your thoughts on whether the Crown would be prepared to rank as an unsecured creditor for the amount that it subrogated, or as a deferred creditor, so that the amount available to unsecured creditors can also be increased and be in line with the thoughts included in the bill?

Mr. Howard: If there is anything I do not arrogate doing, it is speaking on behalf of the Crown. To the credit of the federal government, the Crown has already given up a very large amount of its preferred claim. Are you asking

me whether the Crown would be willing to relegate itself still lower?

Mr. Zwaig: On the amount of subrogation under the insurance scheme, yes.

Senator Cook: The insurance scheme has nothing to do with the Crown; it is the employers who set up the insurance scheme.

Mr. Howard: That is what is unclear to me. Are you equating the insurance scheme with the Crown?

Mr. Zwaig: Yes.

Mr. Howard: I think the Crown would neither consent nor object. It would be neutral in this respect, because the insurance scheme would have to be funded, and if it were subrogated to a lower status, the premiums would have to be raised, if there were substantial claims against the fund.

As I said earlier, the government is relatively neutral in this respect. It is a balance of interest between the people who pay the premiums and the unsecured creditors. As I indicated, we would like to have something left in the estate for the unsecured creditors to ensure that they would play an active role in the administration of the estate.

The Chairman: As I understand you now, Mr. Howard, the fund is originally built up by contributions from the employer?

Mr. Howard: That is the model in Europe, yes.

The Chairman: If there is a failure and the fund is called on to pay, the fund is then subrogated to the right of the wage earners for whatever arrears are owing to them, so the employers are called upon to pay a second time.

Mr. Howard: Only to the extent that the employers are also creditors in that estate are they called upon to pay a second time. The amount is paid out of the fund; it is covered by the general premium levy.

The Chairman: You are misunderstanding me. First of all, as a business continues to operate, the employer must contribute monthly an amount to provide a fund that will be available in the event of the failure of that company to pay something on account of the wages that are in arrears. When that happens, there is a further liability on the employer, because the rights of the workers are subrogated—or is it the right of the fund? Which is it?

Mr. Howard: The right of the fund is subrogated to the preferred claims the employees have for their wage arrears.

The Chairman: Then the fund can demand from the assets of the estate an amount which will repay what has been paid out. So then it is going back again into the employer's fund and that employer's fund will be called upon to make further payments on account of the arrears to the employee. It looks like ring around the roses.

Mr. Baird: It is my understanding that the contribution is only paid at the first time, is that correct?

Mr. Howard: It is a general contribution to an insurance scheme and an insurance fund is created. Of course, where there is a default by an insolvent corporation to pay wages, the arrears are paid out of the fund in the ordinary course at once. Then, the fund in turn claims against the estate.

The question is whether that fund, in claiming against the estate is a preferred, an ordinary unsecured, or a deferred creditor. There is no question of a second levy if indeed we made the fund a deferred creditor against the estate. Then, it follows that if we have quite a few insolvencies with wage arrears, the fund premium would have to go up to cover the increased aggregate claims against the fund.

The Chairman: The moment bankruptcy intervenes, the obligations of the estate to the fund to make payments would stop.

Mr. Landry: Yes.

The Chairman: Because the employment would stop.

Mr. Howard: That is correct. So, there is really no double payment by that particular estate.

The Chairman: Not in the future but at that moment when the failure occurred, and the fund pays the employees, then the fund has a claim against the assets of the estate for reimbursement of that money.

Mr. Howard: That is correct.

The Chairman: When the fund gets that reimbursement, what does it do with it?

Mr. Howard: It puts the money back into the fund. The fund does not go out to the employers to seek greater premiums.

The Chairman: The money is put back into the fund, but the fund has no more employees.

Senator Cook: The fund is a third party, Mr. Chairman.

The Chairman: The fund is closed.

Senator Cook: The fund is a third party. The fund remains always, just like an insurance company, with contributions of a thousand other employees. The fund is a third party.

Senator Walker: It is continuous.

Mr. Howard: The fund should be conceived of as an insurance company with a very special limited policy.

The Chairman: This is not the case of a fund designed to operate in relation to one company?

Mr. Howard: That is correct, sir; it would be a universal fund with universal contributions into it.

Senator Buckwold: How would those contributions be made, on an annual basis or once in a lifetime or on demand?

The Chairman: It had better be on a weekly basis, I would think.

Mr. Landry: It depends on the size of the company or business. In France, for example, if it is a large company it is a weekly contribution. As the number of employees goes down, it may be once every three months or once a year.

Senator Buckwold: But the same amount per employee?

Mr. Landry: The same amount per employee.

Senator Buckwold: It is not related to the size of the wages? In other words, the contribution is still the same

whether the man makes the equivalent of $100 a week or $500 a week?

Mr. Landry: Yes.

Senator Buckwold: May I ask one other question, Mr. Chairman? I think it is fairly fundamental. What kind of figure are we looking at in Canada? I am sure you must have statistics of what wage earners have lost under our present system, where they rank as straight secured creditors.

The Chairman: You mean an average?

Senator Buckwold: Yes. Are we making this into a much bigger thing than it really is?

Mr. Landry: Well, I have tried for quite some time to attempt to determine the extent of unpaid wages in Canada. Unfortnately, the only statistics we have are with respect to actual bankruptcies. We have no statistics where there are, for example, liquidation outside bankruptcy, such as in the case of receiverships or in the case of simply a firm closing down its doors and no records being kept anywhere.

I have asked different associations, the labour unions and provincial governments, for statistics they have which would picture the amount of outstanding claims unpaid in Canada. In the statistics that we have with respect to actual bankruptcies in Canada, the outstanding amount is very small indeed, under the present act. I sent a letter to Mr. Zwaig some months ago in which those statistics are detailed. If we do rely only on those statistics, it is certainly not worth it to establish a fund.

Senator Buckwold: We still have not had that figure. Could you give it to us?

Mr. Landry: Yes.

Senator Walker: For what it is worth.

Senator Buckwold: Well, whatever it is.

Mr. Baird: I have it here.

Mr. Landry: We have two samples. The first sample related to commercial files closed in 1973. We then have another sample made of all commercial files closed in 1974. From both we came to figures that would indicate the amount unpaid would be very low indeed.

For example, in the total commercial files closed, there were $707,000 approximately but only $311,000 remain unpaid to wage earners.

Senator Desruisseaux: That is for all bankruptcies throughout Canada?

Senator Buckwold: This is the point I am trying to get at. I wonder if we are sometimes making a mountain out of a molehill. In fact, by getting into this whole thing we are going to end up having a wage bill of $20 million or $30 million, before you get finished, by using it for other purposes. I think the committee should be very cautious and just consider how serious this problem is.

The Chairman: Except this is only part of the figure. These are figures that are available.

Senator Buckwold: These are figures of all the bankruptcies but it does not involve liquidations. On the other hand, the insurance schemes may not involve the liquidations or the business that closes up without going through the formalities, this type of thing.

Mr. Howard: I would like to make clear that under the act here, for example, the part on receivership is designed to make sure that where there is insolvency, any interested person could force bankruptcy of that estate in order to bring it under the present priority scheme set out in the bill. We would presume the same kind of thing would happen if an insurance scheme were set up.

Just so you know, in our rough estimates based on these projections, we have forecast there must be somewhere between $2½ million and $4 million a year in arrears of wages under the present system. It could be greater than that.

Senator Desruisseaux: And there are about five million employees in Canada?

Mr. Howard: Closer to nine million in the work force, so, it is, relatively, a small amount. However, I think I can safely say here that to actually set up a simple fund and to collect the premium and to administer the fund is a very small, uncomplicated operation.

Presently in Canada the Department of National Revenue, along with tax withholdings, collects unemployment insurance contributions and could collect these insurance contributions, which would be just a small increment on top of what is already withheld or paid or remitted to government. Thus, it is not a complicated system.

Senator Buckwold: Except you could have a different class of payee. You have indicated that not all employers will be contributing in the sense that hospitals would not be a contributor, the municipal government would not be a contributor. There is a wide variety, I presume, of semi-or quasi-public organizations which would not be contributors who are presently contributors. You would have to differentiate somewhere along the line.

Mr. Howard: That is correct. Probably some such distinctions will have to be made. However, we would not attempt to analyze the risk of any particular industry in order to draw differentiations among premium obligations.

Senator Cook: Obviously a company that is not likely to go bankrupt is going to contribute. I mean, if it is a Crown corporation it is highly unlikely that it is going to go bankrupt and it is highly unlikely that it is going to contribute.

This started first from the idea, as I understand it, to protect the estate. In other words, to be fair, this $2,000 preferential claim might be very serious from the point of view that no creditor would receive very much. The scheme was not based on a humanitarian point of view in trying to protect the wage earner; it was trying to protect the estate, as I understand it. From my point of view, it seems to be a waste of time discussing it any further.

Mr. Howard: I just wish to add, Mr. Chairman, that we think we have a humanitarian point of view in this, also.

Senator Buckwold: I certainly support that. I have said before that, as far as I am concerned, the worker should be protected to the limit of the creditor to do so.

Senator Cook: At whose expense?

Senator Buckwold: Even at the expense of the creditor. I support that all the way and, in view of the figures you

have given us, I do not think it is as serious a problem as we may create by this.

Senator Desruisseaux: Mr. Chairman, in the case of a corporation which is operating well there is no trouble. However, supposing it goes into bankruptcy and has insufficient money to pay the employees, are not the directors responsible for that payment?

The Chairman: Under the bill.

Senator Desruisseaux: But otherwise; I mean under corporation law also.

The Chairman: The corporation is responsible.

Mr. Baird: Yes; the directors are liable under the Canada Corporations Act and under the Business Corporations Act in Ontario. However, in some jurisdictions the directors are not personally liable. Some provincial corporation statutes do not provide personal liability provisions for directors, one of those jurisdictions being Nova Scotia.

The Chairman: But the personal liability is limited to a certain period back from the date of the insolvency.

Mr. Baird: Yes.

The Chairman: Under the Canada Business Corporations Act.

Senator Laird: But you are not necessarily trying to sell us on this being the solution? You have given us some alternatives, of which this is one?

Mr. Howard: Yes, sir.

Senator Laird: And, if I may say so, you do not seem all that enthusiastic about that scheme.

Mr. Howard: May I state my enthusiasm?

The Chairman: Yes, go ahead.

Mr. Howard: If I had to choose between the type of model we have set out in the bill, in which we render every secured financing uncertain, and an insurance scheme, I would prefer an insurance scheme.

Senator Laird: Yes; I suppose that is a good point.

Senator Cook: Is that humanitarian?

The Chairman: As Mr. Howard used the work, he talked about "humanitarian" and I suppose it does qualify as being humanitarian if a system is created whereby there can be an assurance that businesses can continue to be financed. If that is so, they can continue to provide employment. Therefore, if they continue to provide employment, they continue to provide purchasing powers and so the wheel spins. Then the economy is that much better, but what must be measured is the practicability, and we must not make the employer pay too high a price for the privilege of being able to secure financing when he needs it in his business, because the employee also has an interest in that and a very serious interest. If he cannot finance, the employment may well cease.

Senator Laird: Are we, though, faced with the alternative of either having an insurance scheme and thereby preserving the rights of secured creditors, or otherwise? In other words, is there a real alternative there, Mr. Howard? Must we make a choice?

Mr. Howard: Of course, the third alternative is to keep the law as it exists presently, that is, with the secured creditors having absolute priority over the wage earners, although the wage earners themselves are preferred creditors to a limited extent over ordinary, unsecured creditors. However, in France, Germany and England this has been found to be a very unsatisfactory state of affairs. I cannot state what the general values of Canadians are, but in my opinion Senator Buckwold has given a general view of what most Canadians think. That is, that the wageearner who has a claim for wages against an estate should be totally protected. As I say, that is a pure political value judgment. My preference is for an insurance scheme.

Senator Laird: They need to be protected but, on the other hand, to have something to protect them a company must be able to operate and it cannot operate if it cannot obtain credit on the strenght of giving security. If the rights of secured creditors are cut down, I think that would be a very dangerous situation.

The Chairman: So you have to find a method other than the method proposed in the bill. I believe that is your view, Mr. Howard.

Mr. Howard: Yes I think that in Canada today the employees must be protected from this kind of loss. That leaves us in a position in which we have the model set out in the bill, or some type of insurance scheme. Our major concern with the insurance scheme has been the difficulty in collecting the contributions, administering the fund and paying out. We think that can be set up in a very streamlined, low-cost manner under the existing arrangement.

Senator Laird: Is there any merit in getting the employees in on this contribution, in addition to the employers?

Mr. Howard: That is always a possibility; obviously, I cannot answer that. That has not been the pattern in Europe.

Senator Laird: Well, it may not be the pattern there but, on the other hand, that is no reason why it could not be the system here. In other words, it so often happens that if no contribution is made by the employee he views it as something that is there and available for him, regardless of any other aspects of the situation. It seems to impart more responsibility on him if he is partly contributing.

Mr. Howard: That could be so in theory. One of the difficulties is that it complicates the administrative system, that is, withholding from employees the payment of the contribution. We assume the premium payment would be relatively small.

The Chairman: It does not complicate any more than the collections on the withholding tax.

Mr. Howard: Except that it is a very small amount. I used 10 cents per week as a rough figure and if 5 cents had to be taken off each employee, including those who worked only part of the week because they are casual employees, that means accounting for this premium on a one-to-one basis.

Senator Laird: Yes; whereas if there is no contribution by the employee it becomes a simple matter of deduction from the company alone.

Mr. Howard: Yes, relative to the global number of employees on the payroll during that period of time.

The Chairman: We will have to consider that. Is there any other point we have missed on this particular subject?

Mr. Baird: No; I think you have covered it pretty thoroughly.

The next topic I wish to deal with is the provision of Bill C-60 relating to the rights of secured creditors, first with respect to the stay of proceedings imposed upon them by the provisions of the new bill, and, also, the restrictions on the realization by secured creditors. Clause 138 constitutes a basic stay of proceedings on all creditors, subject to clauses 238, 240 and 242. When a petition for bankruptcy is filed, all proceedings against the debtor are stayed: (a) until the petition is withdrawn or dismissed or a bankruptcy order is made; (b) until the court grants leave.

Clauses 238, 240 and 242 carry on to impose a direct obligation on the secured creditors. The most significant is clause 240(1) which provides that subject to subclause (5), which is property that would depreciate in value until the final accounts of an estate are passed, no secured creditor is entitled to realize on his security unless (a) he files a proof of claim with the trustee; and (b) the trustee does not exercise his right to redeem the property subject to the security interest. The trustee is given a period of 30 days in which to decide whether he wishes to redeem the property. So, basically, there is a 30-day automatic stay of proceedings against a secured creditor created by the provisions of Bill C-60.

Mr. Howard, could you comment on the reasons for that?

Mr. Howard: Certainly a basic reason right now is that the secured creditor is largely outside the scope of the bankruptcy system. He simply exercises his rights under the contract that creates the security interest. Often even the trustee of the estate does not know what is going on. By the time he gets control the secured creditors have cleaned out all the assets of the business, or at least the more valuable assets. The purpose of this was to change the onus. The present act empowers the trustee to take positive action to hold up the secured creditor who has realized. Instead, under the bill, we have required that every secured creditor, before he moves to realize, give notice of his interest to the trustee. We then give an election of the trustee, under clause 241. He has the election either to realize himself and pay the secured creditor or to allow the secured creditor to take the asset and claim for any deficiency as an unsecured creditor. That was the real purpose of it.

We have had a number of comments from people, and, of course, unsecured creditors have a very different approach to this. They see it as giving them considerable protection that they do not now have. Other creditors have an ambivalent view because sometimes they are secured and sometimes they are unsecured. Secured creditors feel that the delays are prejudicial to them.

The Chairman: The 30-day delay may mean that the secured creditor would lose the opportunity of disposing of the property. Why a 30-day notice?

Mr. Howard: It is purely arbitrary.

Mr. Landry: The 30-day delay was found to be fair for the trustee to determine whether he is or is not interested in buying back the security interest.

The Chairman: But he is playing with someone else's security or asset.

Mr. Landry: That is the position in all cases of insolvency. There is a situation where not all creditors will receive 100 cents in the dollar.

The Chairman. We are concerned about this particular provision, whether it is fair to require that the trustee receive a 30-day notice before the secured creditor can exercise his right to sell. He may have an offer and he must give a "yes" or "no" within 10 days.

Mr. Landry: There is a posibility that the trustee will agree to the sale taking place prior to the 30-day limit. The 30-day period is an outside limit within which a decision must be taken.

The Chairman: You know that the trustee most likely would take the full benefit of the outside limit.

Mr. Landry: Perhaps I have more faith in trustees than appears to be the case in some quarters. I understand that most trustees are businessmen and can certainly pass a business judgment on whether or not they should agree to a sale taking place. I think they would agree if they found out that a quick sale would bring about a return for the unsecured creditors. I cannot imagine any trustee refusing to agree to a quick sale prior to the 30-day period if it were to the benefit of all concerned.

This is not really a new feature in Canadian law. We may refer, for example, to the winding-up Act, which was meant to liquidate solvent and insolvent corporations. There is, under sections 79 and 81, an automatic stay on secured creditors as well as unsecured creditors. This is to give an opportunity to the liquidators and the courts to determine the best course of action to be followed to maximize the recovery of all creditors, including secured creditors. It must also be pointed out that there are some safeguards built into the bill. For example, rapidly depreciating assets or perishables can be liquidated immediately by the secured creditors.

The Chairman: But that is outside the question I raised. I referred to the 30-day period that the trustee can take advantage of. He might take advantage of it for some bargaining purpose.

Mr. Baird: He might clearly take advantage of it if there was very little chance of recovery for the bankrupt's estate. He would use it as a lever when there is no proper access.

Mr. Landry: It is a difficult question to answer. I might also say they would not do that, but I cannot prove it.

Mr. Howard: May I ask a question of Mr. Zwaig, who has had a lot of practical experience in this area? How long would it take a trustee, in a relatively complicated industrial firm—or perhaps a construction firm—to obtain an evaluation of specific assets in which creditors have a security interest? Could it be done in, say, 10 or 20 days?

Mr. Zwaig: It could be done in 10 to 15 days.

Mr. Howard: This is what we are really concerned about, putting the trustee under pressure to make a decision to give up an asset before he has had an opportunity to have the asset appraised by an independent evaluator. I think the trustee would want that.

Mr. Zwaig: I would certainly hope so. My concern is that by making the delay too long before the secured creditor can realize, is, in fact, putting a leverage weapon in the

hands of the trustee that he has over a secured creditor on realizing an asset, for which there would be no ultimate benefit to the mass of creditors.

Mr. Howard: When cross-examining, I hesitate to go one step further. Do you agree that the onus should be shifted, as it is under the Winding-up Act, to require the secured creditor to give a notice of security interest to the trustee and allow reasonable delay so that the trustee can make a decision?

The Chairman: I think the requirement that notice be given to the trustee is a reasonable one, but I certainly think that 30 days is much too long, because the trustee can use it for certain purposes. The trustee is a knowledgeable and experienced person. Being knowledgeable and experienced, he can use his judgment to decide in this case whether a little pressure will produce a better result for the estate.

The first interest in these circumstances should be the interest of the secured creditor, because that is what he is entitled to by virtue of his secured position.

Mr. Howard: But we have to be concerned, in developing a bill of this type, that there is a reasonable balance of interests between unsecured and secured creditors.

The Chairman: In considering that, you have to add the other factor, which is that the balance must not affect the ability of a company generally to finance.

Mr. Howard: I would agree with that. That is certainly the major problem with the present wage-earner priority.

Mr. Baird: Even a 15-day stay of proceedings has very practical problems. It is my submission that you might consider some modification of that. For example, suppose a receiver has been appointed and is carrying on the business of the company, to force him to have even a 15-day stay of proceedings would be unrealistic. In addition, if the bank is notified on receivables and is collecting the accounts receivable of a company, you do not want to force the bank from realizing on receivables during that period.

Thirdly, you may have a field of tractors of an implement dealer and you need someone to take possession of those tractors and to look after them. You may have a landlord who wants to be paid some rent for the property. The way the bill is framed, those issues do not seem to be covered. Who is going to pay those costs? Who will incur those obligations? Who is responsible for looking after the assets in the interval? The trustee does not want to do it—he may not have any money—and the secured creditor cannot.

I like the idea of forcing the secured creditor to give notice to the trustee, to tell the trustee what is the position, and to preclude him from selling out in the ordinary course of business for perhaps 30 days; but give the secured creditor all those ancillary rights: the right to take possession, the right to collect the receivables, the right to stop the landlord from coming in and restraining on the rent. A modified stay of perhaps 30 days might not be unreasonable.

Mr. Howard: Would you also empower the trustee to go to court in case he felt the realizing creditor was realizing too aggressively?

Mr. Baird: I would give the court the right to supervise the method of realization. That is not really available at the present time.

Mr. Landry: That is an interesting suggestion, Mr. Baird.

Mr. Baird: If we could consider a modification to both, we could get a fair balance of rights.

The Chairman: That is Mr. Baird's point of view. He is one of our experts. It is not the position of the committee at this time.

Mr. Zwaig: Another aspect is that where a receiver, or an agent acting for a secured creditor, is in the process of realizing, that that realization continue—perhaps with a reporting scheme to the trustee or to the court—and as a result the process does not stop and you are not faced with Mr. Baird's problem of the truck on the way.

Mr. Landry: I do not think it was the intention, Mr. Zwaig, to stop the ongoing realization. The word that is used in the bill is "proceedings," and I think that was meant to be equated with court proceedings, or taking possession when possession has not already taken place. I realize that this has to be clarified.

The Chairman: Mr. Landry, if the assets on which the creditor has secured are exposed to the elements, and if they are located on leased property, then some action has to be taken at once to preserve those assets. The secured creditor should take that action, but he should be protected in doing so. What have you done in that respect in the bill?

Mr. Landry: Am I wrong in equating that with perishables or goods that are rapidly depreciating in value?

The Chairman: Well, I do not know whether you could call a tractor a perishable article. It is something that can suffer deterioration; it is something on which a landlord may develop a lien; it is something that ages and, therefore, its depreciated value decreases. There are many factors. This problem is not solved by simply saying that the trustee has 30 days in which to make up his mind as to whether or not he wants to take over the assets. I think we have to deal with all the things that may occur and which may affect the value of the assets.

Mr. Howard: Under clause 240(5), which deals with perishable assets or assets that depreciate rapidly, we certainly attempt to permit the secured creditor to act to protect his secured interest in any reasonable circumstance. Of course, Mr. Baird's suggestion would be considerably more flexible and would strengthen or at least better clarify the position of the secured creditor.

Mr. Baird: In my opinion—and it is only my opinion—the 30-day stay is not unreasonable if you give these ancillary rights to the secured creditor.

Mr. Howard: If an evaluation can be obtained within 15 days, very often the trustee would give up any claim he has to the property well before the 30-day stay expired.

Mr. Zwaig: It is not a question of whether he would give it up, but the leverage he would have over that secured creditor in the event that there was no realization for the mass of creditors and that was an asset that required to be dealt with in the short term.

The Chairman: Clause 240(5) states that the secured creditor may take conservatory measures.

Mr. Howard: Yes.

Mr. Baird: It gives the secured creditor the right to take conservatory measures, but it is fairly limited in scope. I think it could be broadened.

Mr. Howard: Yes, I think we would agree with that, Mr. Baird. We did not want to imply here that it was the warehouse full of apples that we were trying to deal with. We were trying to make it general enough so that it would apply to the inventory of tractors out in the field.

Mr. Baird: Another problem which was dealt with in the committee previously is that the stay of proceedings might prevent a mechanic's lien from being filed, the purpose of which would be to perfect the security. Would it also, in your opinion, prevent a debenture holder from filing his debenture in the appropriate office, or registering a chattel mortgage? Is that, in your opinion, covered by the stay of proceedings?

Mr. Howard: We have to admit that the wording is ambiguous. We will have to make it abundantly clear that any stay under this act would not preclude any person from perfecting his secured interest by registration or, in the case of a mechanic's lien action, initiating such an action within the delay period required under the provincial laws.

Mr. Landry: There is another possible alternative, Mr. Baird, and that is clause 402, which states:

> Where a remedy of a creditor or the right of a creditor to institute or continue an action, execution or other proceeding against a debtor or his property is stayed by this Act, the period of time during which the right or remedy is so stayed shall not be included in the computation of a period of time prescribed by a statute of limitations or period of prescription after which the remedy or right may not be enforced.

Mr. Baird: Yes, that clause is there, but a bankruptcy takes a considerable length of time to administer. Property could be sold, for example, before a lien is registered and, therefore, it would not be subject to the lien. The stay of proceedings created by the administration of the bankruptcy might still prejudice the creditors. I prefer the concept of perfection being allowed to continue, notwithstanding the bankruptcy.

The Chairman: That seems to be the most reasonable method. Are there any other points, Mr. Baird?

Mr. Baird: That concludes the basic points that we considered on the rights of secured creditors, Mr. Chairman.

The Chairman: I have an unrelated question that I would like to put to both of you gentlemen. It has to do with a commercial arrangement and/or the extension for the individual debtor. During the period of time that these provisions operate, these arrangements, the creditor has no position. The debtor remains in possession of the assets. Is that not right?

Mr. Howard: Yes, as is the case under the present law where you have such an arrangement. The bill continues this in respect of arrangements.

The Chairman: I am not concerned about what the present law says. This bill is supposed to improve the law. You have a debtor who possibly should be the last person in the world in possession of the assets. He has made a failure of his handling of them. When a compromise of any kind is proposed, why should the creditor's voice be silenced?

Mr. Howard: Since the creditors have to agree to the arrangement, if they feel that the debtor is not capable of administering his personal affairs or, in the case of a commercial arrangement, his business affairs, then as a term of the arrangement the creditors can impose their will and substitute their manager to control the debtor.

The Chairman: But let's talk about the extension.

Mr. Howard: Are we getting into individual arrangements?

The Chairman: Yes.

Mr. Howard: As far as possible, where it is an individual or consumer arrangement, we would prefer that the individual be compelled to handle his own affairs because, as I mentioned earlier, we think that is the best technique of rehabilitation.

The Chairman: I am not thinking of looking at it from that point of view. I am looking at it from the point of view that he should not be free of the supervision of the creditor because the creditor has rights too.

Mr. Howard: Our review has shown that the creditor is getting back his money in respect to the extension. Only when there is a default does the creditor—

The Chairman: Mr. Howard, don't say he is getting back his money. Just say there is an arrangement which provides over a period of time for the possibility that he may pay the money that he owes. In the meantime he has the assets.

Mr. Howard: Yes, that is correct.

The Chairman: There should be something that would give him some hand in the supervision.

Mr. Landry: If I may, Mr. Chairman, I would like to point to clause 67(c) and also to clause 81(b). I think that part of the arrangement could include some provisions to protect assets on which secured creditors or any creditors may have a right, that may be in jeopardy due to some action on the part of the debtor. That is under clause 67.

The Chairman: We will look at clause 67 now. Who has an obligation under clause 67 to see to it that that provision is there?

Mr. Landry: Any creditor; that is under another clause of the bill.

The Chairman: Where does it state that he is notified or must be notified that an extension is being considered or is being granted?

Mr. Landry: All creditors that are affected by the arrangement must be notified by the administrator, and then, as is seen in the arrangement by way of extension, one of the powers that is given to all creditors is to come forward to the administrator and point out to him that in this particular case there should be some special safeguard to protect specific assets from being misused.

The Chairman: Well, there is a discretion in the hands of the administrator.

Mr. Landry: Well, I would imagine that if the administrator does not use his rights correctly and does not per-

form his duties properly, under the provisions of the bill he will certainly be subject to the Federal Court Act and, indeed, subject to administrative censure, I would imagine.

The Chairman: Yes. Well, it is all right to have a penalty of that kind, or of any kind; but you want a smoothly-working situation in which at all times the creditors' position is reasonably well safeguarded. Why should we not say that there must be some provision in any proposal of this nature in relation to safeguarding the assets of the debtor?

Mr. Landry: That being a duty imposed on the administrator?

The Chairman: A duty imposed on the administrator.

Mr. Landry: I would prefer leaving it to the creditor, who knows better what his position should be in making those points to the administrator, I believe.

The Chairman: I think I would prefer it this way, that you impose the duty on the administrator, who may impose it on the creditor, and you could make the provision that that would require the consent of the creditor. Is that too difficult?

Mr. Landry: No. I think perhaps I would like to qualify the answer I gave just a moment ago. If we have a look at clause 81, it says that:

> A debtor in respect of whom an arrangement is made under this Part shall—

And then we have to look at (b) which reads:

> execute such instruments and generally do such acts or things in relation to his property as may be ordered by the court or reasonably required by the administrator.

I do not know if this partially answers the question you are raising, but there is a duty on the administrator.

The Chairman: No. It imposes the duty on the debtor. Is that not right?

Mr. Landry: No. On the administrator, or on the creditor, if he wants to apply to the court.

The Chairman: In clause 81 it says:

> A debtor in respect of whom an arrangement is made under this Part shall . . . (b) execute such instruments and generally do such acts or things in relation to his property as may be ordered by the court or reasonably required by the administrator.

What I am getting at is, instead of saying that these are things the debtor must do, I think the creditor wants to have a hand in there somewhere. He must consent and be satisfied that the debtor is the kind of person who should be entrusted with possession of these assets.

Mr. Howard: May I answer that, Mr. Chairman? During the last session we went into considerable detail about the resources required to administer this kind of system. As far as possible we have set up the administration on an exceptions basis, so that a public agency only has to come in and supervise events where there is some default, or some reason to expect there will be a default. This is an example of an exception. If the debtor is in default, a creditor could initiate bankruptcy proceedings, if he wants to, and if the aggregate amount of that creditor's claim is sufficient to trigger the bankruptcy provisions. Wherever possible we would like to keep out of it and put the onus on the debtor to manage his affairs better, under the general surveillance but not the specific surveillance of the trustee or administrator. That is always a very costly process.

The Chairman: This is where we differ. I think the debtor, if he is going to secure an extension, he makes a proposal which the administrator thinks is all right, but the debtor can only enjoy rights as to continued possession of his assets with the consent of the creditor. He may have a car and he may have quite a good time with it, with no intention of ultimately paying his debts. What is to prevent a debtor, Mr. Howard, in those circumstances from disposing of his car?

Mr. Howard: Although there are some limited constraints in respect of these consumer arrangements, on the rights of secured creditors, normally a car will be subject to some kind of security interest, usually a conditional sale agreement, and that precludes the debtor from selling it unless he wants to commit fraud.

The Chairman: Except the car may not be subject to any lien or conditional sale agreement.

Mr. Howard: Then he is free to deal with it. He is in an arrangement where that has to be one of his assets and that will be disclosed at the time the arrangement is made. The creditors may say, "We do not agree to any arrangement." They may insist on holding a meeting and they may want to look into his affairs and, indeed, may even put him into bankruptcy so that they can realize against that car and have their debts paid. We have tried to leave this as flexible as possible and to give the creditors general surveillance over these affairs, before they agree to a proposal.

The Chairman: I think you may have gone too far in the direction of the debtor. If the debtor is left with, what I would call, tradeable assets, then he is in a position to deal with them himself.

Mr. Howard: When we design provisions of this type, we have to look at the average household in Canada. The kind of assets it has are normally a house subject to a mortgage, a car subject to a conditional sale, durables in the house subject to chattel mortgages or similar security interests. Most households have very few assets that are in any way excess. The real problem is that their budgeting is bad or gets out of control and they cannot keep up all of the payments on these various assets.

Mr. Baird: A view that has been expressed is it would be preferable to have a creditor input on the approval of the extension, as well as on the approval of a composition arrangement. Why have you given a creditor input only on the composition and not on the extension?

Mr. Howard: When you say "input" you mean the formal meeting?

Mr. Baird: Yes, the right to approve or reject.

Mr. Howard: With the composition, we are asking him to give up part of his contractual claim. On the extension, the assumption is he is going to be repaid the full amount, including interest over an extended period of time.

The Chairman: The plan provides for the possibility of such payment.

Mr. Howard: There is no guarantee, obviously, that he would be paid in full. That was the reason behind it, pure

and simple, that we get away from the expensive formality of a creditors' meeting in respect of the simple extension.

Mr. Baird: Would it not be possible to do it by correspondence? You would not need a meeting for extension.

Mr. Howard: Perhaps, in respect of both, we could have some sort of proxy voting system or written ballot system. I do not know. We are open to suggestion on that. That was the reason for that kind of formality, to get away from expensive meetings of creditors.

Mr. Baird: I think in small debtor situations the experience has proven to be that the creditors have not considered it worthwhile to attend the meetings and therefore they much prefer to do it by correspondence.

Mr. Howard: We have the real problem that the creditors do not come to the meetings.

Mr. Zwaig: You have been talking in terms, under the present plan, where you have debtor bankruptcies. Now you are going into a new concept of consumer debtor arrangements. I think there should be creditor input regardless of whether the plan purports to give the creditor 100 cents on the dollar, or less. It is a new concept. I think there should be creditor input into that.

Mr. Landry: Maybe I will be repeating what has already been said, but in the case of an extension, the assumption is that the creditors, including secured creditors, will be getting 100 cents on the dollar plus interest. They are given rights under the bill in clause 74. They have the right to make an objection with respect to items that are listed in clause 74. They are also given the right to ask that conservatory measures be taken with respect to certain assets, over which they believe some measure should be taken to protect their value. That is under clause 81(b), as I have stated before. I think creditors on balance are getting, under the bill, as much protection as seems to be needed in the case where 100 cents on the dollar is being offered. It is a different question in the case of composition. There is a meeting provided for creditors in a form where they can either reject, amend or accept the proposal as put forward.

The Chairman: Do you think the creditor is getting as great a benefit in what is being offered and he should be ready to yield on some points? Actually, the view I take of it is that the creditor at that stage is getting nothing except an offer and the performance depends on the debtor. In the meantime, the debtor can enjoy the assets.

Mr. Landry: Yes. Well, when a proposal is prepared by the administrator there are a certain number of guidelines that should permit the administrator to present a feasible proposal. It certainly cannot be guaranteed that all proposals will be fulfilled completely in all cases. However, there are some guidelines. For example the administrator must consider the potentials of the debtor's earning capacity and his family responsibilities. If he comes to the conclusion that within three years the debtor can pay off all his debts, including interest and if it appears reasonable that he can do it, the creditors may have an input, which is provided by the bill. There are good chances that the debtor will get through it, unless unforseeable circumstances should arise.

The Chairman: I think we have given this one a good shake. We have had a busy day today, starting at 9.30 this morning, and I think it is a good time to adjourn. If you gentlemen are available then, we will resume in the morning at 9.30.

Mr. Howard: We will be available, senator.

The Chairman: Is that agreeable to the committee?

Hon. Senators: Agreed.

The committee adjourned.

Thursday, November 20, 1975.

Upon resuming at 9.30 a.m.

Senator Salter A. Hayden (*Chairman*) in the Chair.

The Chairman: Honourable senators, we are continuing the bankruptcy study this morning. The first item to be dealt with by Mr. Baird is that of the courts.

Mr. Baird: The courts, yes. Mr. Chairman, in the discussions of the committee we have reviewed various matters in the bill relating to the courts. The first point we would like to discuss today is the position of the registrar in bankruptcy. Under the new bill there is no reference to a registrar in bankruptcy. "Court" is defined in clause 2 as being the trial division of the Supreme Court or Superior Court of the province or territory. Section 374 provides that the minister may, with the concurrence of the Minister of Justice, authorize a judge of a county court to exercise any or all of the powers and jurisdiction of the court or judge. This provision is contained in the existing Bankruptcy Act but has not to my knowledge, been used in Ontario. It might have been used in other jurisdictions, but I am not aware of that. We have discussed the problems relating to the position of registrar being abolished. The general problems we have seen would be delay, turning matters over to the judges of the court, who have not been able to develop an expertise in bankruptcy matters, and costs, because the registrar has been acting expeditiously and quickly and not requiring a very complicated procedure. Also, the position of the registrar gives a practising lawyer doing bankruptcy work the opportunity of having bankruptcy matters heard in priority to normal civil matters, which has been an advantage that might be lost under the new legislation.

Mr. Landry, would you like to comment on the reasons why the position of registrar has been abolished?

Mr. Landry: The report published in 1970 indicated that there was a problem in trying to establish a special court for bankruptcy matters, a court which would be different from the normal, common jurisdiction courts which exist throughout Canada. If you recall, historically there seems to have been an attempt made in 1919 to establish a specific court to hear bankruptcy matters. Then in 1949 Parliament backed off from that position. So the position that has been taken in this bill is to leave in the hands of the provincial authorities who, under the constitution, have the responsibility for the administration of justice, the duty and responsibility to appoint the court officials and establish the court structures best suited to hear not only bankruptcy matters but also any legal matters in a particular province, territory or jurisdiction. That was the basic reason, to leave in the hands of the provincial authorities the duty and responsibility to set up the administrative structure around the courts to hear bankruptcy matters. I understand very well that the point has been made that if we do that and do not indicate in the bankruptcy legislation any

guidelines as to the expeditious nature necessary in any bankruptcy proceeding, we might lose something that is very precious under the present administration.

Mr. Howard has stated previously, in one of the meetings, that we are flexible in considering leaving in the hands of a registrar any matters of a judicial nature if they can be more expeditiously and more cheaply administered by him rather than the administrator. On the other hand, Mr. Howard has stated also that any administrative responsibilities, from an efficiency point of view, should be taken out of the courts and left with the administrator to deal with.

For example, in the case of taxation of accounts, we see no problem in granting to a specific official of the courts the authority to deal with those matters. That could be one area that could be left to the registrar. Another alternative to be considered is one that has been implemented in the Divorce Act, for example. The normal courts have jurisdiction over divorce matters, but there is, in the Divorce Act, a series of guidelines establishing what authority the officials of the court may have in dealing with those matters. That is a model that could be followed as another alternative.

The Chairman: I believe the reason for extending the jurisdiction in divorce matters to the county court was the volume of business. The courts were overloaded and, therefore, they extended the jurisdiction so that the volume could be dealt with more readily.

There is not that problem in bankruptcy. The real problem in bankruptcy is that you have a practice that has continued for a very long time. So a certain amount of experience and expertise has been acquired, and the registrar, from what I have been able to gather over the years, has done a very efficient and capable job. Certainly, having a bankruptcy judge—that is, one judge who is designated by the Chief Justice to deal with bankruptcy—has worked very well. I know it has in Ontario, and I suspect it has in other provinces. I do not know why we should abandon that.

Senator Walker: Why are we abandoning that, because bankruptcy is a most complicated subject? Judges are just ordinary lawyers who have been elevated. Most of them have not dealt in bankruptcy and I do not think would be able to handle it. Why has this been done, Mr. Chairman?

Mr. Howard: Mr. Chairman, may I respond to that, at least in part? Firstly, I would like to make it clear that judges presently handle a great deal of the bankruptcy work. The really difficult decisions are not made by a registrar; they are ultimately made by one of the judges. Quite frankly, as in the corporation law, this bill reflects that we have a great deal of faith in the common sense of judges even if they are not experts in the field—

Senator Walker: That is nice of you, but—

Mr. Howard: I think it is realistic too. We cannot assume that we are going to have registrars with—

Senator Walker: Just one moment. Let me ask the questions and you give the answers. Why do you want to spread it right across the Supreme Court of Ontario, or any other trial division, instead of having one judge cover it the way we have in admiralty and other phases of the court?

Mr. Howard: The bill itself reflects a bias against any specialization of the courts, which in turn requires anyone in Ontario who has a bankruptcy problem to go to Toronto—either fly there or work through an agent in Toronto. So far as possible, particularly with respect to the administrative functions, we wanted those handled through local offices. We appreciate your point that it is a great advantage to have specialized people. We, of course, have a vested interest in that because it makes our administration easier and less costly. What we really wanted to do is to give to the courts as much flexibility as possible to determine what structure they would want and how far they can delegate the functions.

Senator Walker: Would you give them the right to appoint a bankruptcy judge among themselves?

Mr. Howard: Yes, if they felt that was the best way to handle it. They would have that power.

Senator Walker: That is the answer to my question.

Mr. Howard: Some provinces have asked us to give the Chief Justice of the Supreme Court power even to assign these responsibilities to county courts, where that would be useful.

Mr. Baird: Our concern is that the present act gives the Chief Justice the power to designate a specific judge, and this has been deleted in the bill. My concern is that the power to designate a specific judge would not be acted upon.

Senator Walker: Why has it been deleted if you are still going to allow them to do it?

Mr. Landry: The main reason is that under the court structure in all provinces the Chief Justice has responsibility over all the judges under his jurisdiction. They set up hearings and determine who will hear what matters in which week. They have that responsibility under their jurisdiction. We felt it would be a repetition in the bankruptcy bill to say something that is already said somewhere else. That is the only reason. We are not taking anything away from the Chief Justice. We are taking it away from the Bankruptcy Act, where we felt it was not necessary.

Senator Walker: You thought it was redundant?

Mr. Landry: Yes.

Mr. Baird: In my submission, it is not redundant, because without an emphasis on bankruptcy I am concerned that the Chief Justice of each province will not appoint a specific judge. Bankruptcy is not a popular subject. It is my experience that many judges have been reluctant to hear bankruptcy matters. The designation of a bankruptcy judge has been an unpopular one. Without some statutory emphasis on the designation, I do not think it will take place.

Senator Macnaughton: In other words, they do not have to?

Mr. Baird: Yes. This statute forces them to do it, and we have been successful in having a designation. But I am told that a number of judges have declined that designation because of their reluctance to hear bankruptcy matters.

Senator Walker: Because they know nothing about it.

The Chairman: Yes, that is right.

Senator Walker: I think it should be put back in again, Mr. Chiarman, with the greatest respect, having heard our counsel and the explanation made by the department. It does not seem to be reasonable that it should be deleted. What harm is it doing? It guided the Chief Justice and made it peremtory that he should give directions. Now we have no such direction. It is true he has the power to do it. He has the power to do a lot of things, but it does not mean that he is going to do it.

The Chairman: Under this bill any judge—the judge of the week, for instance—would take your proceedings. It could be that he has no knowledge of bankruptcy law. I am not reflecting on a particular judge, but against that you do have the opportunity to build up bankruptcy knowledge in a particular judge. There has been a definite advantage in that over the years. It seems difficult to understand why we should abandon something that has worked well.

Senator Walker: Thank you, Mr. Chairman.

Mr. Landry: I would point out one small problem, Mr. Chairman. In Ontario, for example, pressure has been on us to try to impose on the Chief Justice the obligation to decentralize, particularly in the Ottawa area, where the local bar feels it is not getting the type of service it should be getting. This is also true of other areas in Ontario. They feel that a great degree of centralization is not a good thing.

That means that we are required to have the federal government intrude into responsibilities of the provincial governments in determining the type of structure and the type of court responsibilities that should be decentralized. It is an uncomfortable position to be in, to superimpose on provincial jurisdiction a structure that perhaps they do not feel they should have.

The Chairman: I do not think there has been a march on Ottawa praying for this decentralization to take place.

Mr. Landry: Well, there was tremendous pressure.

The Chairman: It depends what you mean by "tremendous pressure."

Senator Walker: That is the first time I have heard anything about it. Were you aware of it?

Mr. Howard: I was not aware of it.

The Chairman: Is this pressure that has manifested itself since the concept of the present bill was developed? There does not appear to have been any effort to change the procedures that have been in place for many, many years.

Senator Walker: I take it you are talking about the Chief Justice for the Province of Ontario.

Mr. Landry: Yes.

Senator Walker: We now have a new Chief Justice who is in good health and who is young, vigorous, and extremely capable.

Senator Macnaughton: I wonder if Mr. Howard would care to counter-attack.

Mr. Howard: Perhaps not counter-attack, but I would like to point out that we are not in any way hostile to this kind of suggestion. Our only concern is that it should not be too strict or too wooden; it should be flexible. We have come under considerable pressure in British Columbia, for example, to assign certain bankruptcy functions to the county court judges so that lawyers do not have to fly in several hundred miles to Vancouver in order to deal with a problem that is now handled by the registrar in Vancouver or by a judge in chambers in Vancouver. We do not take objection if this bill does somehow admonish the Chief Justice to assign this work to others. We do not feel we should impose any structure on the provincial system.

Senator Cook: It would also be an advantage in Newfoundland for the county court judges to be able to handle some of these functions.

The Chairman: That could quite easily be accomplished by leaving it solely to the Chief Justice of the respective provinces to make such a designation and giving him the option to make use of the chief of the county or district court in making such appointments.

Mr. Baird: The bill would give that power to the minister. It does not give it to the Chief Justice of the province. The power to authorize a judge of the county court to exercise these functions is not given to the Chief Justice.

Senator Cook: I suggest, Mr. Chairman, the Chief Justice of the respective provinces would know more about this whole area than would the Minister of Justice, in many cases.

The Chairman: If there is nothing further on that point, we will move on.

Mr. Baird: There are other powers of the court, in addition to the change in functions, which the bill would change, the first being with respect to the discharge of the bankrupt. The bill provides that an individual ceases to be a bankrupt if within 90 days from the date of the bankruptcy the administrator has not filed a caveat. Under the present law, each bankrupt must apply for his discharge, and the court determines whether or not he should be discharged.

I acknowledge that in many cases this is a waste of time in that the discharges are granted automatically. However, it is my submission that the creditors should be given an opportunity of determining whether or not a bankrupt should be granted his discharge, and this determination should not be left solely to the administrator.

The creditors should be entitled to oppose the discharge. Under the proposed bill, if the administrator does not file a caveat, the bankrupt is automatically discharged, leaving the creditors no recourse.

Do you have any comment on that, Mr. Landry?

Mr. Landry: Over the years we have found that in many instances debtors were being required to appear before the court with the only result being that they were missing one day's work. What would happen would vary from one part of Canada to another. In many instances, the bankrupt would simply be discharged, although in some instances, depending on the local conditions, very strict conditions would be imposed.

What the bill tries to accomplish in this respect is administration by exception, and that would apply in the case of courts also; only the most obvious cases of abuse of the bankruptcy system should be brought to the attention of the courts, which are already overburdened with work. That is the basic philosophy we are trying to introduce in the bill.

We are trying to distinguish between the effect that a bankruptcy has on the assets of a debtor and the effect on the person of the debtor. With respect to the effect on the assets of the debtor, we believe that this is a matter for creditors to be highly involved in. The creditors must recover, to the extent possible, all of the debts that are owed to them, and there are many features in the bill which are aimed at promoting a greater interest on the part of the creditors in the administration of the assets.

With respect to the effect on the bankrupt, we feel that the public interest is at stake. In many instances in the past, for example, trustees or creditors took great interest in trying to make sure that the public interest was protected. It was felt, also, that in many instances their first concern should be to recover debts owing, and we felt it was placing on the trustees and creditors an undue burden to have them protect the public interest.

The basic philosophy behind the distinction that is made in the bill is that rather than having all debtors before the courts, only those who have been guilty of some unacceptable commercial conduct should be brought before the courts.

The Chairman: Why shouldn't the creditors have a say in whether the bankrupt should be discharged or not?

Mr. Landry: The creditors do have a say in it, Mr. Chairman. It is just another way of bringing those facts to the attention of the public official. For example, under the bill, the public official has a duty to examine the debtor. There is also provision for a meeting to which all creditors are invited to come and indicate what responsibility should rest with a particular debtor. The creditors will then bring those facts to the attention of the administrator and the administrator would have the responsibility of launching an investigation into the affairs of the debtor. Even today, the administrator is the person who is responsible for determining whether or not a debtor has been guilty of any unacceptable conduct.

So, the input from creditors is there, and the mechanism by which the creditors can bring those facts to the attention of the administrator is in place. The only difference is that the administrator is the one who will have the responsibility of bringing those facts before the court.

The Chairman: The interest is represented by the opinion of the administrator, and only indirectly does the creditor have any voice.

Senator Everett: Mr. Chairman, it seems to me that the witness has not answered the question that was asked. That was a very interesting tour we just had, but I would like to hear the answer to the question which was put to him.

Mr. Howard: May I try to answer it bluntly?

Senator Walker: No, not bluntly.

Mr. Howard: Succinctly.

Senator Walker: That is better.

Mr. Howard: The question is why the creditors do not have the right to initiate action before the court or, in short, why the creditors themselves cannot recommend that a caveat be issued in a particular case. I do not think we have any objection to that, if such a procedure can be worked out on an "exceptions" basis. At the present time, for every 100 cases that come up for discharge, 95 represent empty formality. Indeed, in some jurisdictions with respect to consumer debtors, our employees take in 30 at a time and just run through them. It is like running through a check list.

Our major concern is that we do not bother the courts with this kind of detail. We want the exceptionally troublesome cases to be brought forward. If the suggestion is that the creditors themselves, either through their inspectors, or some other means, be empowered to bring the question of the issuance of a caveat before the court, I think we would be amenable to such a suggestion. I personally have not thought it through. Perhaps Mr. Landry has.

Mr. Baird: A serious point arises with respect to the after-acquired earnings of the debtor. In some cases the bankrupt has no assets for distribution among creditors, but he has a high earning potential, such as a professional man, a doctor or psychiatrist. If he is guilty of no misconduct under the present bill he is entitled to a discharge, and the creditors would have no opportunity of requiring an order for payment over a period of time. I think creditors should be given the opportunity of going to the court and requesting the court to make an order for payment out of after-acquired earnings.

Mr. Landry: I am afraid if I start answering the question I shall be accused of not answering it properly. However, I think I have to say that under the bill the emphasis is to try to get as many debtors as possible under an arrangement, rather than going through bankruptcy. At an earlier meeting I quoted figures on the results of arrangements, by way of return to creditors, compared with results under bankruptcy. One of the aims of the bill is to get people who have the capacity to earn and wish to repay their debts, and can repay their debts, under an arrangement rather than bankruptcy. I agree there will still be a large number of bankruptcies, for obvious reasons. If I might repeat what I have already said, the distinction is that it is only in exceptional cases that we feel the court should be faced with making the deicsion whether or not a debtor should continue to contribute out of after-acquired earnings.

Senator McIlraith: In those exceptional cases, though, you do not provide for the creditor to be heard if he wishes to be heard. This is the point. You leave that discretion with someone else. If the creditor thinks there has been some irregularity, surely he should have a right to be heard somewhere. Surely he should not be cut right out of the picture, as he appears to be under this procedure.

The Chairman: Senator McIlraith's question has really focused attention on the point that really concerns us. You have given some explanation. Is there anything further you would like to add to that, or do we pass on to the next subject?

Mr. Landry: The only thing I would like to clarify is that in addition to the administrator being charged with the responsibility of making sure the public interest is protected, creditors could also be given that responsibility.

Senator McIlraith: I would put it a little differently. I would like the creditor to have the right to be heard. Administrators' ideas of public interest may be very good, but they may not take care of the particular interest of a creditor in an estate. Why should that creditor, as a member of the public, be shut out from having any right to be heard, when the other persons are obviously heard? The debtor is being taken care of by the automatic effluxion of

time. No one can make him answer or explain why he should have a discharge; only the administrator has to be satisfied on that point. Why should not the creditor be allowed to have his say on it?

Mr. Howard: I should like to add one thing to that. Our concern is that if we allow just one creditor to go into court and question whether the debtor should be automatically discharged or whether a caveat should issue, there is the danger that we get back into the old routine under which nearly all cases were going before the court on this formality. Would it bother you if we required that, for example, a certain percentage of the creditors must support this application to the court in connection with a caveat? That would get us round this administrative problem of going in on cases where we think the creditor is just being vindictive.

Senator McIlraith: The administrative problem arose because the debtors were required to apply to be discharged. That is what caused it. My point now is, why should the creditor not be entitled to be heard in those cases where he thinks that the debtor should be required to apply for a discharge? You have given that right to the administrator only. You have not left it with the creditor. Surely the creditor should have it in that small percentage of cases where the creditor thinks there is some reason why the debtor should not be discharged, or should be discharged on terms.

The Chairman: The question Mr. Howard puts is: should it be a majority of the creditors who would have the right to consult with the administrator, and the administrator could not make the application without their approval, or should one creditor, regardless of the amount of his claim, have the right?

Senator McIlraith: I think it would have to be governed by the amount and a percentage of the total.

The Chairman: A majority.

Senator McIlraith: I have no rigid ideas on what that should be.

Mr. Baird: I think it would only be in exceptional cases that this would happen. I would leave it in the hands of one creditor. If he feels strongly enough to be prepared to spend the time and money making an application to oppose the discharge, I think he should be entitled to be heard. Obviously he feels very strongly about it. If it had to be a percentage he might be precluded. If he has lost money he should at least have the recourse of going to court and complaining.

Mr. Zwaig: The right of the creditor to be heard under the system proposed in the bill can be put very simply. If one knows that the debtor will obtain his discharge in 90 days, with the notice of bankruptcy there could be stipulated a date by which creditors who are interested or have information or wish to oppose can file their notice of opposition. If the administrator receives nothing the discharge is automatic; if he does receive something he has to bring the issue before the court and the court decides on the application for discharge. In other words, it is a summary procedure that is not very complex.

Senator Everett: Under your system would the creditor be required to appear?

Mr. Zwaig: Yes.

The Chairman: Have we dealt with all the viewpoints on that?

Senator Everett: I think it would be interesting to hear the reaction of the witnesses to the proposal.

Mr. Landry: I would like Mr. Zwaig to clarify one thing. Are you saying the creditors should make their views known in writing to the administrator or to the court?

Mr. Zwaig: To the administrator.

Mr. Landry: I would tend to agree with that.

Senator Walker: You would go along with that, would you?

Mr. Landry: Yes.

Mr. Baird: Another matter in dealing with the courts is the issue of public records. At the present time the court maintains a public record of all bankruptcy matters. Any person interested in a bankruptcy can go to the court and he has the right of access to the public files. The new bill provides that the superintendent shall keep a public record of arrangements, bankruptcy orders and so on. It does not provide for a public record of all documents relating to the bankruptcy, such as statements of affairs, official receivers' questionnaires, or minutes of meetings of creditors. The new bill does not provide that these documents will be matters of public record, as they are at the present time. It is unclear what record will be maintained by the court, or whether or not the court will still maintain a public record. It is my reading of the bill that this is not intended, that it is the superintendent who will be required to keep a public record of only certain documents, but the rest of the material, which is now a matter of public record, will not be available to the public. Is that correct, Mr. Landry?

Mr. Landry: There are two questions that you have put forward. The first one is that the responsibility now would lie, under the bill, with the superintendent to keep a public record of certain documents or certain facts that have occurred. This is under section 13 of the bill. The reasoning behind this is that today each official receiver, each court registry must keep a separate record. You cannot find anywhere in Canada complete data on whether or not someone is bankrupt. Creditors feel this is a weakness. If you have to search all the court registries in Canada to find out if Mr. X is bankrupt or in insolvency proceedings, it is just an impossible task.

What we are trying to do is to have a central place where all bankruptcy and insolvency proceedings will be kept. Anyone having an interest in those matters will have access to them.

This data will be decentralized throughout local offices across Canada. We are trying to put this on computer now so that immediate and quick access to those records would be available to the public, to financial institutions or to anyone who has any interest in finding out if a debtor is insolvent or not.

Mr. Baird: I understood that one of the major problems at the present time was you had to search in each province and that you were going to overcome this by a central registry. I then heard the comment that it was going to be decentralized. Are you going to have one central registry for Canada for all bankruptcies and, therefore, you would write to Ottawa for that information; or if you are search-

ing in Halifax, can you find information for across Canada in Halifax.

Mr. Landry: That is right.

Mr. Baird: I was not clear what your intention was.

Senator Macnaughton: Mr. Chairman, this section 13, subsection (f) publish in a periodical available to the public—what is that; a weekly, monthly periodical?

Mr. Landry: We have made it flexible enough so that it is not mandatory to have the publishing in the *Canada Gazette*. The *Canada Gazette* is a periodical that is open to the public but there may be other periodicals that will be available generally to the public that might be more suitable than the *Canada Gazette*.

Senator Walker: *MacLean's* Magazine when it gets rid of *Time* and *Reader's Digest*.

The Chairman: The main question is: Will there be as much in the way of records available to the central registry as are presently available?

This was part of Mr. Baird's question.

Mr. Landry: That was the second part of his question. On the first part of the question, is the answer clear?

Mr. Baird: You are going to maintain a universal system available at your regional offices. I think that is a good suggestion.

Mr. Landry: With respect to the other part of you question: What would happen if, for example, someone wanted to records of the debtor proof of claims and other documents that are now available . . .?

Mr. Baird: Proof of claims are not available because they are maintained by the trustees. The trustees' records are not available to members of the public. They are available to any creditor who is entitled to look at them. There is a distinction.

There are documents at the present time that are available to the public because they are part of court records and by law anyone can look at them. These are minutes of meetings of creditors and the statement of affairs and the official receiver's questionnaire.

Now, where are these going to be kept and how will public have access to them?

Mr. Landry: Certainly the creditors will have access to them. Anyone who can show an interest in the proceeding has a right to access, under the bill.

Senator Flynn: Where are they going to be kept?

Senator Macnaughton: In Toronto.

Senator Walker: He is pondering the decision he is going to make. Will it be in Ottawa, perhaps?

Mr. Landry: Certainly not in Ottawa. Under the present act, we are decentralizing all the files to the regions. This has just been recently completed for Ontario. It is also the case in other parts of Canada, and soon files will be decentralized all over Canada.

Senator Cook: What happens if you have a mail strike?

The Chairman: The next point, Mr. Baird?

Senator McIlraith: He is just getting that answer.

Mr. Baird: We will wait for the answer.

Mr. Landry: Section 13(h) could be relied upon to have the records made public. One thing we certainly did not want to do was to prevent the creditor from having access to the records of the particular file in which he was interested. You are asking whether the general public would have access to other records than those that are of public interest in section 13?

Mr. Baird: Yes, that is my question.

Mr. Landry: We did not want to preclude that but I do not believe it is specifically dealt with in the bill.

Senator Flynn: It is provided for in the present act.

Mr. Baird: It is provided for in the rules. Rule 8 of the bankruptcy rules is that every proceeding shall remain of record in court and may at any reasonable time be inspected by any person. There is no restriction under the present rules.

Senator Flynn: Probably this rule will continue.

Mr. Landry: That is why I refer to section 13(h) which says:

> Keep such other records of proceedings under this Act as he considers advisable.

Certainly we do not want to depart from the present status of having all records in courts made public. They are by their nature public records.

Mr. Baird: Would you continue the proceedure whereby these documents will be filed with the court? Do you intend to continue that procedure?

Mr. Landry: The documents that relate to court proceedings, yes.

Mr. Baird: Not a minute of a meeting of creditors; now that is presently filed and kept in the court record and that will not be available in the court record?

Mr. Landry: There is nothing specific in the bill about that.

Senator Walker: Where will it go?

Mr. Landry: We kept it in what is known today as the official receiver's office or the trustee's office.

Senator Cook: Mr. Chairman, I do not think it is question of intention. I think if it is necessary, it should be in the act. The present intention of the witness is interesting but not binding. If this is an important matter, it should be in the act.

Mr. Zwaig: Is there any reason why the present procedure is deviated from in the bill?

Mr. Landry: One of the reasons is you have duplication of files. Today you have one in the courts and you have one in the official receiver's office and you have one in the trustee's office. You have three places where you have documents that are duplicated.

Mr. Zwaig: The creditors have access to the trustee's records. The general public has access to the court records. No one really has access to the official receiver's records unless it is an interested creditor. It would be a duplication between his records and the trustee's records, except perhaps for reports between the regional offices and Ottawa.

The information that is in the court records today, which is of public interest, and which may include items like a statement of affairs would seem, under the bill, to be only included in the administrator's file and the trustee's file.

Is there any reason why that information cannot be made available to the interested general public?

Mr. Howard: We have no objection to making that king of information available. What we are trying to do is split off the judicial and administrative functions and get what are really administrative functions out of the court files and into a comprehensive file in the bankruptcy administrator's office.

Mr. Zwaig: Then the bankruptcy administrator's file is available today to the general public and would be available under the bill to the public?

Mr. Howard: Under the corporation law, we have to split the two between what is a public disclosure file and what is a personal correspondence file. There are certain things on the official receiver's file that should not be disclosed to the public.

We have done this for many many years on the corporation side. We have to do something similar here.

We have to have some policy discretion. Obviously we do not mind direction, specific recommendations as to what documents must be made public. We have to have some discretion about correspondence with the individual debtor that he does not want disclosed to the public, and for good reason, we do not disclose it.

Senator Cook: Mr. Chairman, if an interested creditor can see it, I do not see an awful lot of merit in the general public not seeing it? What is the point about the general public looking at it?

The Chairman: Curiosity, I would think.

Senator Cook: In that case I might see it.

Mr. Baird: Also, you might not be a creditor of that particular estate. You might feel there is some connection between another estate and the particular estate you are a creditor in but you cannot show you are a creditor, therefore, you are not entitled to review those documents. If you limit it to specifically being a creditor of an estate, you are precluding an investigation by a newspaper reporter, for example, or some person like that.

Senator Desruisseaux: It could, for example, be an investigation by a firm of auditors interested in the situation of the creditor involved.

Mr. Baird: Yes, that is correct.

Mr. Chairman, my major point was that I thought there should be clarification of where the records would be kept and what records would be available to the public.

It is quite clear, Mr. Howard, that you intend some clarification of that.

Mr. Howard: Yes. We will have a universal file in the head office and it will also be out in regional offices. We will have then to distinguish, in each dossier in that file, what is public and what is non-public. We can do that in rules. It certainly is much easier to do it in rules than to try to anticipate now what should be or should not be public.

As you can see in your Committee there are some sensitive feelings about what should be disclosed to the public and we have to try to reflect those feelings in the rules.

Senator Flynn: Depending upon the circumstances, an application could be made either to the administrator or to the court for access to the file.

Senator Everett: Perhaps we could go at it by exception: what in the present rules that is public would you propose to make not public.

Mr. Howard: Offhand, I cannot think of where we would want to draw any difference about what is public now and what will be public in future. Mr. Baird has mentioned the "statement of affairs." For example, a credit bureau or future creditor wanting to go back to examine in detail the reasons for a previous bankruptcy has a legitimate ground for access to that file. We would not want to preclude him altogether. He has access to that now by going to the court file. We would probably want to keep the same documents public documents. In other words, there would be no change in present policy.

Senator Flynn: What documents would you want to keep secret?

Mr. Howard: Correspondence between the debtor and our office or between the trustee and our office, correspondence which they request we keep private. It may concern personal family matters, or there may be other complications which should not form part of a public record.

Mr. Landry: Or investigations or complaints.

Senator Cook: It would inhibit how the bankrupts would answer correspondence if it were to be made public.

Senator Everett: What you are saying is that you propose to follow the present rule and not make any changes in it.

Mr. Howard: That is correct. The only change would be the location of the document.

Senator Everett: Yes.

Mr. Howard: Not access by the public.

Mr. Baird: The next matter is with respect to the power of the court to have control over the administrator. Clause 383 of the bill provides that the court has power to control and overrule the acts and the decisions of the interim receiver or trustee. There is no provision for control by the court with respect to the administrator. Would you explain why that has been omitted?

Mr. Landry: We have to make a distinction here, Mr. Chairman, between the administrator acting as an interim receiver or as a trustee and the administrator acting as administrator. Where he will be acting as a trustee he is under control of the court pursuant to clause 383 as you have pointed out. Where he is acting as administrator, as is the case today where he is acting as the official receiver, there is no change as to the control the courts may have over the actions, or omissions, of the administrator.

Mr. Baird: Excuse me. He has been given many new powers under the new Bill.

Mr. Landry: For any person who believes that the administrator has not performed his duties in a regular

fashion, there is provision under section 28 of The Federal Court Act for that person to go to the Federal Court to have the matter dealt with.

The Chairman: Mr. Landry; you revert to section 28 of The Federal Court Act. We have had to consider that from time to time. Some of the views expressed here as to the scope and effect of section 28 with respect to appeals indicate that it leaves a lot to be desired. I once put it this way: the decision has to be an odd kind of decision where they so obviously have departed completely from any principle and have been whimsical, really, in their decision that a right of appeal would exist.

What is the objection to providing for an appeal?

Mr. Landry: It is not provided for under the present Act. That might not be a good reason.

The Chairman: This is supposed to be an improved Act, is it not?

Senator Cook: That is a good point, Mr. Chairman.

Mr. Howard: Admittedly, Mr. Chairman, there are issues here which we have characterized as administrative questions, but which someone else would have characterized as judicial or quasi-judicial. For example, this gets us back to the caveat and whether or not it should be a purely administrative issue that the administrator deals with, without referring to the creditors and without being subject to express appeal to the courts. That is one of the grey issues.

Under The Federal Court Act, sections 18 and 28, there are extremely broad review powers. Where we do not administer fairly, then we are subject to review under that act. The review of the administrative procedure under section 18 of that act is extraordinarily broad by any standards anywhere in the world. Whether the court will exercise that power aggressively we cannot foresee yet, but in one licensing case they certainly did attack us quite successfully, compelling us to review our entire procedures in order to ensure that our licensing procedures would seen by outsiders to be more fair.

I admit that there are grey areas between what is judicial and what is administrative, but where it is an administrative issue we do not want to be brought into the court to explain our administrative decision when there was no adverse party conflict.

Mr. Baird: One matter I was concerned about was the small debtor arrangements. Where a creditor opposes or objects to an extension arrangement, the administrator has to make the decision either to approve the arrangement as he originally drafted it or to adopt or accept the creditor's objection. In that case you have not given a creditor the right of appeal to the court, if he is dissatisfied with the administrator's decision. The administrator's decision is final.

Mr. Howard: That is right. His recourse is to seek a review of that administrative action by the equivalent of a prerogative writ on the ground that the action was arbitrary or not justified in the circumstances. In short, there would be no express appeal but only a review of that decision as an administrative decision.

Mr. Baird: That usually deals with the scope of representation and what has been heard. It does not constitute, usually, a review of his judgment or a review of his decision in itself.

Mr. Howard: No, It is a review, essentially, of his jurisdiction and his procedures to determine whether he exercised his administrative power fairly or arbitrarily. If he exercised it seemingly arbitrarily, then the decision will be quashed.

Mr. Baird: What if his decision is wrong, but that in the court's opinion he exercised or followed the proper procedure and listened to both parties, and the court says, "Well, in our opinion the decision should have been the contrary."

Mr. Howard: But what if the court's decision is wrong, in what is really a fairly routine administrative matter?

Mr. Baird: There is a right of appeal farther up. If one judge is wrong, the court of appeal corrects him. You are saying that the administrator should have the right to make a final decision without there being any right of appeal.

Mr. Howard: That is right. You have expressed very well what is exactly our problem. We do not think that relatively small, mundane administrative matters should be subjected to the whole complication of appeals.

Senator Everett: I doubt if there is a difference of opinion on that; but the point that is being raised is that some of the decisions of the administrator are substantially more than mundane matters of pure administration. There are some that are of a quasi-judicial nature. The point that is being brought to your attention is that those matters should be subject to this section, and in exercising those powers the administrator ought to be brought within the operation of section 383 in the same way as he is when vested in the clothing of the trustee or the interim receiver.

Mr. Howard: I would agree with you where it is a material matter and not a matter of ministerial or administrative routine. Then there should perhaps be some express appeal, and where there is some adverse party conflict, even between the administrator and the debtor, perhaps it should be subject to appeal; but I think we will have to go through these one by one, or at least your advisers will, and then make recommendations to you on those. I do not think we can discuss it further in the abstract.

Senator Everett: I would be interested to know our advisers' reactions to your statement.

Mr. Baird: My practical reaction is that unless it is an important matter no one will attempt to get the court to review it, because of the cost factor and because of the time involved. No one would bring a small, frivolous matter to the court. He would only do if it were a matter of importance. Therefore I do not have the same concern about giving the courts the right to review a decision of the administrator, because I do not think that power would be exercised, except in an important case.

Senator Everett: I suppose it is a case of who should be inconvenienced the most readily, the aggrieved party or the administrator.

The Chairman: Well, I think the answer is simple there.

Senator Everett: I would think it is, yes.

Mr. Howard: Mr. Chairman, may I add one comment to that?

The Chairman: Yes.

Mr. Howard: There is one difficulty on which I appear to be in an ambivalent position. When I was before you on the Corporations bill I underlined there that most major administrative decisions are subject to express appeal under that bill. We, of course, considered this in the bankruptcy bill, because that is to some degree our bias as administrators. However, there is one other factor in the bankruptcy bill, and that is, if you build in these methods of attack, then the most aggressive collection agencies will invoke these strategies in order to show that they are tough debt collectors.

This is where we have our problem of balance, and this is largely why it was characterized as it is in this bill; that is, subject to judicial review, but not subject to express appeal all the time.

The Chairman: That only takes you so far. If a proceeding is taken, and the result changes the decision of the administrator, then the procedure, or the provision of the procedure, was justified. How are you going to determine that? All you can do is provide the opportunity, and if you want to limit the opportunity, you can limit it to any decisions of the administrator that may have judicial characteristics.

Senator Flynn: You see, a person would have to be aggrieved by the decision of the administrators I do not think there is any great risk in providing the opportunity to appeal from any decision of an administrator, because you have that test of whether the person is aggrieved. He has to show cause, and demonstrate that the decision has affected him adversely. You could not apply it simply because the administrator may have done something that affects you adversely. You have to show that you have a real interest in the change you are requesting.

Senator Cook: I would like to ask if there are any instances where these appeals could be taken purely with the object of creating delay, and what would be the purpose of such delay? I am not experienced enough, you see, to understand that.

Mr. Howard: Let me use the simple illustration of the extension in the consumer arrangement area. If one creditor, although very much in the minority, felt strongly enough about it, he could preclude the arrangement from taking place just by bringing on the litigation. As Mr. Baird states, of course, if he wants to assume the risk of bearing the costs of such proceedings, because they do appear to be brought for the sake of harrassment or delay of proceedings, then he is going to have to consider that factor; but we are concerned about that.

As I say, some creditors, as a matter of principle, are very, very aggressive, or very vindictive. That is always in the back of our minds when we characterize these things.

Mr. Zwaig: On the other hand, you may have a major creditor who is an aggrieved creditor, and who would like to appeal the decision of the administrator. I think that avenue should be open to him.

Mr. Howard: Would you consider that he could be a major creditor in a consumer-debtor extension?

Mr. Zwaig: Major in relation to the other creditors.

Mr. Baird: Your consumer-debtor extension is available to a man who owes $100,000. You could have a major creditor there. Your definition of "consumer-debtor" is not unlimited in dollar value, unless he carries on business.

Mr. Landry: I think we must put that into perspective, Mr. Baird. In an arrangement by way of extension the debtor agrees to pay one hundred cents on the dollar, plus the agreed-to rate of interest, within a period of three years, and we give to the creditors the right to contest the amounts that are being paid and the time they are being paid, and they have the opportunity to make an input at that time; but we must not forget that they are being paid one hundred cents on the dollar. In a composition where less than one hundred cents is being offered, creditors are convened at a meeting, at which point they must express their views, and a majority of the votes can carry or turn down the proposal or the arrangement.

Mr. Baird: I think we went over this ground yesterday, but the answer is, of course, that you leave the debtor in possession of his assets. If he has substantial assets, and the creditor does not trust him, that is, if he thinks he is going to dispose, possibly, of his assets, but the administrator in his wisdom, perfectly *bona fide*, trusts the debtor, you have an honest difference of opinion. Should that honest difference of opinion be resolved by the courts?

Mr. Landry: That is provided specifically in section 81(b), as I pointed out yesterday. The court may order the debtor to:

> (b) execute such instruments and generally do such acts or things in relation to his property as may be ordered by the court or reasonably required by the administrator.

You therefore do have there the right of a creditor to apply to the court. But there is an alternative there. The creditor may go to the administrator, and if the administrator refuses his request, then he may go to the court under that specifically built-in section, 81(b).

Mr. Baird: I did not interpret that to go so far as to require a debtor to do something that the administrator did not request him to do.

Mr. Landry: I think the way it is drafted there is wide enough to permit the court to order any type of thing to happen. For example, to dispose of an asset that is rapidly appreciating in value, and that is in danger of being misused by the debtor.

Senator Everett: On that reasoning you would then have no objection to adding the word "administrator" to section 383 for purposes of clarity.

Mr. Landry: I do not think, offhand, I would have any objection to that.

Senator Flynn: It would not complicate the situation, in my view.

Mr. Howard: There is one qualification under that. The administrator has hundreds of purely ministerial and administrative tasks under this bill, and I think it might be necessary to qualify it in that way.

Senator Flynn: If you can, all right.

Mr. Howard: I admit, Senator Flynn, that that is a very difficult thing. The courts have never really succeeded in distinguishing between what is purely administrative and what is purely judicial. In principle, we do not object to it, but we would not want every minor administrative action to be subject to appeal.

Senator Flynn: You would have to show cause in any event, so you could hardly appeal a purely administrative decision.

The Chairman: If you were to say, "other than a purely administrative decision"? What would you think of that?

Senator Flynn: That would guide the court in any event.

Mr. Baird: The next topic on the agenda today is that of obligations imposed on officers and directors under the new bill. There are two major headings in this. One is the liability of an officer or a director for the deficiency in a bankrupt estate, and the other heading is with respect to the right of the court to impose the status of a bankrupt on an officer or director.

Senator Macnaughton: Can you tie that in with a reference?

Mr. Baird: Yes. Clause 176(1) relates to liability for deficiency in a bankrupt estate. I shall summarize it very briefly. It says that an agent is liable for any deficiency in an estate if the agent in his own interest caused the bankrupt when insolvent or unable to pay his debts to carry on business in a manner that was not in the interests of the bankrupt, to enter into a transaction that, at the time of the transaction, could not reasonably be considered to be in the interests of the bankrupt, to refrain from carrying on business in a manner that, at the time, could not reasonably be considered to be in the interests of the bankrupt. Then it carries on dealing with transactions involving sales below cost, ruinous borrowings or similar acts in conducting a business with a view to impeding, defrauding, obstructing or delaying the creditors.

The agent under clause 176(3) is not liable, if at a later time he can prove that the debtor was solvent—if, for example, he was able to come out of his financial difficulties and was able to pay his debts and was paying his debts generally as they became due.

Then clause 178 is a limiting clause saying that the liability of the agent under clause 176 and 177 shall be reduced to the amount of loss or damage caused to the estate.

The Chairman: Is the word "agent" defined?

Mr. Baird: Yes, it is. "Agent" is basically an officer or director of a bankrupt company, or a person controlling a majority of the shares of a company, or a person who performed the duties of an officer of the company although not in fact appointed an officer of the company. This person comes within the definition of "agent" in clause 2 of the new bill.

Mr. Landry, could you explain the reasons why this clause was put in the new bill?

Mr. Landry: Yes. The basic reason, Mr. Baird, was that it was found in many instances that some people were abusing the corporate veil to their own advantage and to the detriment of the creditors and eventually of the shareholders of the company. It was found also that in may instances one of the partners could do the same thing with respect to the partnership, or that an agent, as we know it today, would abuse his fiduciary capacity to the detriment of his principal and also to the detriment of the creditors. So it was found necessary to make sure that those who have abused commercial conduct or who have been responsible for abusive commercial conduct would be personally liable for the acts that they do to the detriment of the estate. That is the basic principle behind those clauses.

Senator Flynn: Mr. Chairman, it seems to me that this new provision could be seen as, I would not say creating, but confirming the right of the trustee to take an action in damages against anyone who has done something contrary to the estate. I mean the action lies in the estate itself and you could execute it if you could prove that there has been conduct detrimental to the estate of the bankrupt. It seems to me that it could have been exercised even without this clause—in some cases anyway—but this will provide for limitation if the company or the bankrupt should become solvent afterwards. In those circumstances the action would disappear. Would that be your view?

Mr. Howard: May I elaborate slightly on that? Under the corporation law we now have express fiduciary duty and duty of care standards. I am focusing now on the fiduciary duty standard. New York and Pennsylvania, for example, have similar statutory provisions in their corporation law. A very high percentage of all the fiduciary duty actions in those jurisdictions now are initiated by trustees in bankruptcy who are claiming damages against former directors and officers on the ground that they acted in their own interests and not in the interests of the corporation. Thus clause 176 is an attempt to particularize and underline in the Bankruptcy Act that the directors and officers of insolvent corporations should pay very special care.

Senator Flynn: In addition a director or an agent of a company is always responsible for its faults.

Senator Desruisseaux: How does this apply when the director has resigned some time before the bankruptcy?

Mr. Landry: This is caught by the definition of "former agent"—that is someone who, within two years preceding the bankruptcy has been an agent. He can be brought back to tidy up the affairs and may also be personally responsible for the damage caused.

Mr. Howard: May I elaborate on that? Of course, if he is just a director, then, as Senator Flynn mentioned in an aside, there has to be some causal connection between his conduct and the damage claimed, and if the director, for exemple, dissented from the decisions made because he felt that they constituted a breach of fiduciary duty and resigned, then he renders himself more or less immune because there is no causal connection between his misconduct and the injury suffered.

Senator Desruisseaux: How about his responsibility for wages?

Mr. Howard: He is responsible for those in any event under this bill as it is cast right now. If you look at clause 175 you will see that his liability there is virtually strict. But under the corporation law there is a qualification on that, for we allow the director or officer to rely on financial statements or reports of other experts.

Senator Cook: I would say that under clause 176 the person himself would have an action, quite apart from the creditors being insolvent. I think the insolvent person himself would have an action against most of the agents under the terms of clause 176.

The Chairman: But under clause 175 he is made specifically liable for wages.

Senator Flynn: Yes, but that is something else.

Senator Cook: But I am saying that the shareholders of a company or the beneficiaries of a trust would have an action under most of the contingencies outlined in clause 176 quite apart from the creditors. I see nothing wrong with clause 176.

Senator Cook: But the deficiency in the estate may develop by reason of wages that are owing.

Mr. Howard: Yes, Mr. Chairman. Where under clause 175 it is in respect of wage arrears, the liabilities of the directors and officers and former directors and officers is almost strict.

Senator Cook: Irrespective of any misconduct.

Mr. Howard: Irrespective of any misconduct. Whereas under clause 176, the plaintiff, who normally would be the trustee of the estate, would have to satisfy the very tough standards in there that the corporation was insolvent and that the directors or officers acted in their own interests, and not in the interests of the corporation, which would be a breach of fiduciary duty.

Senator Cook: But in many instances the shareholders themselves would also have an action.

Mr. Baird: I guess our concern is with a one-man company where the same person is a director and a shareholder and therefore seems to ratify the actions as a shareholder and therefore the company might not have a cause of action. But this gives a cause of action directly to the trustee in bankruptcy.

Senator Everett: I notice in subclause (a) that if the agent caused a person to carry on business in a manner that was not in the interests of that person, then he comes within the section. The other sections use the wording "could not reasonably be considered". I wonder why the test of reasonableness is left out of this section? It seems to me that almost any action that results in insolvency under that section, if it can be shown that the person involved was acting in his own interests, or the interests of someone related to that person, is not subject to the test of reasonableness.

Mr. Landry: I think it is a very well taken point, senator. I may put it that it is simply a slip of the pen.

The Chairman: Well how is the pen going to slip now?

Mr. Landry: In my opinion "reasonably" should be added.

Mr. Howard: We are always reasonable men, Mr. Chairman.

Senator Everett: It should be added in clause 176(1)(a).

Mr. Zwaig: Has consideration been given by you as to how you would define "in his own interests", which is the key phrase in this subsection.

Mr. Howard: You are asking of course, when does a breach of fiduciary duty exist. There is no way in any legal system to define such a difficult concept. Hundreds of cases exist in the jurisprudence, both in bankruptcy law and in corporation law.

Senator Everett: What does the jurisprudence indicate?

Mr. Howard: Where there is any breach of fiduciary duty, the onus is on the agent to justify it, where he acted in his own interests, whether it be by contracting with the corporation and bleeding money out of it in that manner, or through any other act.

Senator Cook: It is almost criminal negligence sometimes.

Mr. Howard: As I say, there is no question of having to fulfil a high standard. An agent has a very, very high fiduciary duty, both under the common law and the civil law. If he even appears to act in his own interest to the detriment of his principal's interest, then he probably is liable.

Senator Flynn: That is why I say it may not have been necessary to include all this, except for clarification and, probably, as a warning.

Mr. Howard: Yes, sir; this is more declaratory than anything else but it does refine the standards.

The Chairman: You are saying, Senator Flynn, that this section codifies?

Senator Flynn: Yes, which is the law under the civil system or the common law system.

The Chairman: What have you to say to that, Mr. Baird, if you look at it in that light, that all this section does is codify the law and the substance of the law which would apply in any event in these circumstances?

Mr. Baird: That is basically the case, except that it is my understanding that a shareholder to some extent might ratify his conduct and therefore the corporation itself may not have a cause of action.

Senator Flynn: The corporation itself may not have a cause of action, but someone who suffers thereby would. I am speaking of the trustee, for instance, or any creditor who was able to prove that and therefore would be entitled to take the action.

Mr. Baird: But the trustee under the present law is the one who stands only in the shoes of the corporation and has no greater rights than the corporation has. It is being attempted to extend that.

Senator Flynn: He is acting not only for the corporation, but for the creditors which, in my opinion, is the point.

Mr. Baird: Generally, yes, but with respect to specified types of matters. I believe they are trying to extend the categories of matters here, to enlarge the category when he is acting on behalf of creditors.

Senator Desruisseaux: Can he be bonded in his duties?

The Chairman: Do you mean could a director limit the liability that he might have under this section by posting a bond?

Senator Desruisseaux: Yes.

Senator Flynn: It would not limit his liability, but simply cover it.

The Chairman: That would depend on the amount of the deficiency and on the amount of the bond.

Senator Flynn: Yes.

Senator Cook: And I believe he must pay for the bond out of his own pocket.

Senator Flynn: The limit is provided in the section, because it says to the extent only of the harm done.

Mr. Howard: I would like to underline also, since many here act as directors on boards, that it is impossible to obtain insurance in a case of breach of fiduciary duty, for example, under a director's and officer's liability policy. If the director or officer has committed some misconduct and has profited from it and then is sued in respect of that, he certainly will not succeed in obtaining coverage under the director's and officer's liability policy. That is a very clear exclusion in all those policies.

Senator Desruisseaux: Actually, they can I believe insure themselves against liabilities that they do not provoke themselves.

Senator Flynn: Simple insurance.

Senator Desruisseaux: Yes, simple insurance.

Mr. Howard: Yes, that is correct.

The Chairman: One point with respect to the type of insurance to which you refer is that it covers the situation by insurance where he would not attract liability in any event. If the liability here is based on misconduct and misconduct is an exception in the insurance policy, then what is he paying for?

Mr. Baird: The key words are "in his own interests". Therefore, as long as the act is not in the interests of that particular director he would be protected. There is no benefit accruing to him personally. My only concern is whether the words "in his own interests" would include a test of the value of his shares. Therefore, would the words be interpreted that broadly, to include just carrying on the business with the hope of keeping the company from going bankrupt, so that eventually it would pull out.

Mr. Landry: I wonder; if the value of the shares is augmented, I am sure the creditors would not suffer, because the shareholders come after creditors.

Mr. Baird: But it is the purpose of carrying on, not the result. The result, of course, is the bankruptcy, so he has obviously failed in his attempt.

Mr. Landry: So his shares have not increased in value?

Mr. Baird: That is correct; so, in fact, he did not obtain any benefit personally. However, that is not the test, which is whether he carried on the business in his own interest. You have not gone so far as to say that he has actually obtained the benefit.

Mr. Landry: Yes; however, section 178 provides that he is liable only to the extent of the damages caused.

Mr. Baird: But there could be damage caused to the corporation without an equivalent benefit obtained by him. He may have attempted to obtain a benefit, but failed to cause damage to the corporation in the attempt. I do not believe there is the automatic corollary of damage to the corporation and benefit. You could limit his liability to the benefit he obtains.

Senator Cook: Yes, but whoever is getting after him has the onus of proving that the actions were in his own interests. That is not a very easy onus to discharge.

The Chairman: Are we not overlooking something? Clause 176.1(a) refers to carrying on business in a manner that was not in the interests of the person, the person being the estate. Therefore, whatever form the estate was in before it became an estate. Do you correlate that to the other expression we have been using, in his own interests?

Senator Cook: That is in the interests of the person who is being charged. In other words, the person being charged is charged with mismanaging for his benefit.

The Chairman: No; it may not be in the interests of the estate and it may just as well not be in the interests of the agent.

Senator Cook: In that case the prosecution would fail.

The Chairman: That is the point I was trying to make. So you cannot assume that because it is not in the interests of the person or the estate that it is in the interests of the agent.

Senator Cook: No.

Mr. Baird: No.

Senator Cook: No, there must be proof that it was close to fraud, actually in the nature of fraud.

Senator Buckwold: Under clause 176(3), which is the defence clause, do all three of the conditions have to exist in order to have a defence?

Mr. Baird: Yes, they do under the wording of the section.

Senator Buckwold: A company could, in fact, be solvent and not paying its bills and there would be no defence.

Mr. Baird: That is correct. All three must apply. The word "and" is included before the last alternative. I have interpreted that as meaning all three must apply. Am I correct in that, Mr. Landry?

Mr. Landry: Yes.

The Chairman: What about the situation where a person appeared to be solvent? Some official may have rigged the accounts.

Mr. Baird: So long as it is not in the interest of an individual director, he would not be liable. Your key test there still goes back to the interest of the director. It must be in his personal interest for him to be liable. The fact that he has made a mistake or has been misled by an officer of the company will not hurt him unless it is something for his own benefit.

The Chairman: There is something wrong with that statement. It will not hurt him?

Mr. Baird: He will not be subject to liability under this section unless the act that took place was to his own personal benefit. That is the way I interpret the words "in his own interest." The act might not have been in the best interests of the corporation, because it was based on incorrect or false information.

Senator Cook: It must be shown that he has received or is trying to receive a special advantage over anyone else.

Mr. Baird: That is my interpretation of it.

Mr. Howard: We could look at it from the corporation law point of view, where it is a special kind of negligence—for example, to pay out dividends where a corporation is either marginally or actually insolvent. In that case we

permit the director to rely on the financial statements prepared by the auditors or the reports prepared by the officers. On the other hand, where it is a breach of fiduciary duty, where the director has acted in his own interest, it is no defence for him to say that he relied on the financial statements. That is consistent with the wording here. We have characterized this throughout as a breach of the fiduciary duty.

The Chairman: But if he relied upon the financial statement and the financial statement showed that the person was solvent, then what?

Mr. Howard: Then there is a weakness in the act here, that in respect of the defence in subclause 3, we do not go on to add the reliance clause, and the defence is somewhat incomplete for that reason.

The Chairman: Should it not be improved upon?

Mr. Howard: I would like to think about it and hear your comments on it. To put the defence in there and not say that he may in good faith rely upon the financial statements prepared by auditors is strange. We have no intention to make him an insurer.

Mr. Baird: The basis of the whole section is that he is acting in bad faith from the start.

The Chairman: Subclause 3 deals with what is a defence.

Mr. Baird: He has a defence even though he has acted in bad faith. He is given a defence by subclause 3. Do you want to give him—

Senator Cook: That is only a defence against creditors or the trustee, not against the person, because he could still be sued by the person.

The Chairman: There should be a defence based upon acting in good faith.

Senator Cook: But the whole section is centred around acting in bad faith.

Senator Flynn: If the company becomes solvent, so far as the creditors are concerned, he cannot prove that they have suffered damages. There could, however, be a problem for the shareholder, who would say, "Then I have suffered because of his fault and I want to sue the man." We are dealing only with the estate at this time, and most likely only for the creditors and not for the shareholders.

The Chairman: That had better be looked at.

Mr. Baird: The next heading is the right of the administrator to apply to the court to impose a status of a bankrupt on an officer and director. This power is given in clause 207 of the bill. It provides that the administrator may within one year of the bankruptcy apply to the court for an order declaring an agent or former agent of the bankrupt to be deemed to be a bankrupt for the purposes of clauses 210, 217, and 359.

Clause 208(1) provides that the administrator must give the agent 20 days notice of the application and serve on the agent a copy of his report which shall set out the causes of the bankruptcy, any relevant facts, including the circumstances described in clause 200, and any matter to which the agent is liable under clauses 176 and 177.

Clause 209 provides that the court shall make such an order if the agent was primarily responsible for the bankruptcy of the bankrupt or substantially aggravated the insolvency or inability to pay the bankrupt, or if any of the circumstances under clause 200 are proven. Could you explain the reason for the new section, Mr. Landry?

Mr. Landry: Yes. This is a major distinction between the concept under clause 176, where the purpose of the section is recovery of assets from people who have misused the funds or commingled the assets of the company with their own funds.

Clause 207, and following, is simply to try to protect the public from grossly incompetent administrators. It has no bearing on the assets of the agents or former agents, but only prevents them from setting up new companies or acting as agents in the future, and prevents them from obtaining credit for business purposes. So the concept here is quite different. It is imposing a Status of bankrupt on that person, having no effect on his assets.

Senator Flynn: Did you say it would have no effect on his assets?

Mr. Baird: Not that clause taken alone. Clause 207 is to prevent agents who have been negligent.

Senator Flynn: Surely if you have a claim under clauses 176 and 177 against an agent or director, and he pays that claim to the extent provided in the act, would you still want him to become bankrupt, despite the fact that he is not bankrupt and pays what he owes because of the liability imposed on him by the act? You would want him to be bankrupt?

Mr. Baird: The court would have to make a decision on the facts brought to its attention.

Senator Flynn: If he is not bankrupt and he can pay whatever debt he owes, due to the liability under this act—if he is solvent, do you want to attach the stigma of bankruptcy to that person?

Mr. Baird: He may be a "fly by night".

Senator Flynn: If he is a "fly by night", he would probably be bankrupt; but if he is able to pay all of his debts, I do not see how you could do that. What would be the result, outside of the stigma?

Mr. Baird: The results outside of the stigma would be nil. He would merely be prevented from setting up new companies, from borrowing money on credit, and from acting in a fiduciary capacity in the future. That is the penalty under clause 200.

Senator Desruisseaux: Only in his own name.

Mr. Baird: Or as an agent for five years.

Senator Barrow: Even if he is able to pay—

Senator Walker: And even in Quebec?

Mr. Baird: And even in Quebec.

Senator Flynn: Where bankruptcy is a federal matter.

Mr. Howard: Could I put in perspective what we are driving at? For example, a small plumbing contractor who subcontracts on large construction projects and sets up a new corporation for every project just happens to have a large number of defaults. The corporation goes bankrupt but he does not. He may be perfectly solvent and able to

pay all claims against him. There may be no kind of misconduct to justify an action under clause 176. This provision is to go through the corporate veil, particularly in closely held corporations—go to the principal and impose on him the status of bankrupt so that he cannot obtain credit to carry on business, simply because he is incompetent or only marginally honest.

Senator Flynn: Are you not entering a field which is completely outside bankruptcy? There is no insolvency in this case. You are trying to say that a case where there is no insolvency shall be deemed to be a case of insolvency or bankruptcy.

Mr. Landry: There must have been bankruptcy—

Senator Flynn: We are dealing with the person who is not insolvent, who has paid all his debts.

Senator Cook: You say the administrator may apply to the court for an order. What would the application set forth?

Mr. Howard: The basic standards are set out in clause 209. What we are saying in this clause is that for purposes of this section the agent is the corporation.

Senator Flynn: You are tying to create a penalty, but it seems to me you are using a rather dubious method. You are dealing with someone who is not insolvent.

Mr. Zwaig: Can you deal with the same problem by means of imposing a sanction against a director without creating the status of a bankrupt?

Mr. Landry: That is the mechanism that is used.

Senator Flynn: You might say that he is deemed to be a bankrupt, but to say that he is bandrupt is, I feel, outside of your jurisdiction.

Mr. Landry: Clause 207 is worded in such a way that should the court declare an agent or former agent bankrupt, he is deemed bankrupt for purposes of clauses 210 to 217, and only for purposes of those sections. The main aim of clause 207 and following is not to punish the agent but to purify, if you wish, the commercial sector.

Senator Flynn: To protect the public generally.

Mr. Landry: That is right, to protect the public from an incompetent person.

Senator Cook: It is only for those sections that he is deemed to be bankrupt?

Mr. Landry: That is right.

Senator Flynn: I still feel it should be worded differently.

Mr. Howard: As I understand your concern, Senator Flynn, you would prefer to say that in those circumstances a person has certain disabilities or limitations on his capacity for a period, say, of five years, but that he is not called a bankrupt.

Senator Flynn: Yes.

Mr. Landry: We have no problem with that.

Senator Flynn: To say that someone who is not insolvent is bankrupt, I think, is going beyond your jurisdiction.

Mr. Baird: It is contradictory in terms. To be bankrupt normally means that an individual or corporation does not have sufficient assets to pay the debts.

The Chairman: If you are not declared to be bankrupt, what is the penalty? We have this rather anomalous situation.

We have been told by our witnesses that the scheme and purpose of this particular bill is to assist a bankrupt in his troubles and to be more humanitarian, which is Mr. Howard's word. However, now we are going to nail a person who is not a bankrupt and call him a bankrupt, and visit penalties on him. I just cannot correlate that.

Mr. Baird: We must retain some form of penalty in respect of misconduct, but not in the sense of calling him a bankrupt.

The Chairman: But there is a penalty under clause 176, is there not?

Mr. Baird: That is a financial penalty.

The Chairman: What other penalty can you impose?

Mr. Baird: We could restrict him from carrying on a similar business for a period of time.

Senator Flynn: Or we could make it such that he could not do any of the things permitted by clauses 210 and following. I think that is generally the idea.

Senator Cook: It is very qualified.

Mr. Baird: Clauses 210 to 213 are very cumbersome. They affect third parties in the business community. I think they will be very difficult to enforce. They involve a restriction on a person who extends credit to a bankrupt, directly or indirectly, immediately or at a future date, for the purpose of assisting the bankrupt to enter into or carry on a business. That is unenforceable, except where the person who extended the credit did so in good faith.

These restrictions affect third parties, and there will be an issue as to whether the third party knew or did not know of the bankruptcy, or whether he acted in good faith. They are very cumbersome to work out. It means that to be absolutely safe a third party should search to determine whether or not the person is a bankrupt.

Senator Cook: First of all, you say a guilty person has to be punished. It then goes to the court and he is only declared by the court deemed to be a bankrupt. Why is that any different from someone who is actually bankrupt as far as the third party is concerned?

Senator Flynn: Looking at clause 221, cessation of bankruptcy, a bankrupt ceases to be a bankrupt if within 90 days from the date of bankruptcy the administrator has not filed a caveat pursuant to clause 202. He cannot do so in the present case because the individual would be solvent.

It goes on to say that the bankrupt ceases to be a bankrupt if the administrator withdraws the caveat or issues a certificate. Neither of those would apply in the present case.

Senator Cook: He would have to wait for five years.

Mr. Baird: I am not sure that I agree with these restrictions even being imposed on a bankrupt. I think they are cumbersome from that point of view.

Senator Flynn: Suppose you have a company that goes bankrupt and it finally finds sufficient assets to pay all its debts, then the bankruptcy does not cease. It is annulled.

Mr. Landry: I think an answer to the point you raised, Senator Flynn, might be found in clause 221(3), which states:

> Where an agent or former agent of a bankrupt is deemed to be a bankrupt by an order of the court under section 207, such order ceases to have any effect when
>
> (a) the administrator issues a certificate pursuant to section 222 in respect of the bankrupt for whom the agent or former agent acted as agent;—

That means where all claims of the corporation are paid—

Senator Flynn: You have completed the vicious circle. You say that he is deemed to be a bankrupt and then in this case you say that he ceases to be a bankrupt when he has paid all his debts. There is something wrong.

Mr. Landry: In other words, even though he pays the debts of the corporation, he would still retain the status of a bankrupt.

Mr. Zwaig: He should not be a deemed bankrupt in the first place.

Senator Flynn: Clause 222 states:

> When all claims admitted in a bankruptcy are fully paid, the administrator shall, upon the application of any interested person, issue a certificate to that effect.

Therefore, the agent against whom you have obtained an order declaring him a bankrupt, can, as soon as he has paid the debts, force the administrator to issue a certificate releasing him from the status of a bankrupt.

Senator Cook: It is the debts of his principal that he pays. As I read that, it is the debts of the principal that have to be paid.

Mr. Landry: The debts of the company, yes.

Senator Flynn: Why do you say that it does not apply to him? You have declared him a bankrupt; he has paid everything he owes. Under clause 222 can he ask the administrator to issue a certificate that he has paid all his debts and therefore he should be released?

Mr. Landry: A corporation can obtain a certificate, yes.

Senator Flynn: Clause 222 does not say a corporation.

Senator Cook: Under clause 176 all he is liable for is the deficiency, and now he has paid it.

Mr. Zwaig: This is the situation where the corporation's debts are paid in full; then he gets his discharge.

Mr. Landry: That is right.

Mr. Zwaig: Does he still retains the status, or does the status drop when the corporation pays its debts in full?

Senator Flynn: There is no relationship to a corporation here. I am looking at the deemed bankrupt or the bankrupt. He has paid everything; he asks the administrator to issue a certificate to that effect, and so he is entitled to his discharge.

Mr. Landry: Not if he pays only his part. I think the standard is all the debts of the corporation.

Senator Flynn: Where do you find that?

Mr. Landry: Clause 221(3) and clause 222.

Senator Flynn: It says:

> Where ... the administrator issues a certificate pursuant to section 222.

Mr. Landry: It goes on:

> ... in respect of the bankrupt for whom the agent or former agent acted as agent.

Or in the case of a bankrupt in the case of a director or officer the bankrupt is a corporation.

Senator Flynn: You say clause 222 does not apply?

Mr. Landry: It applies if all the debts of the corporation are paid.

Senator Flynn: It does not say that.

The Chairman: Senator Flynn, I think there is something in your point about calling such a person a deemed bankrupt. There is something completely wrong with that description, because he may not be a bankrupt or insolvent at all.

Senator Flynn: Not in this case.

The Chairman: I was wondering whether the penalty should be, for example, that he could not thereafter, so long as the bankruptcy itself remained unsatisfied in whole or in part, be able to carry on a similar business without an order of the court.

Senator Flynn: I have some difficulty in swallowing it.

The Chairman: If you are trying to find some penalty, certainly calling him a deemed bankrupt is a fiction.

Senator Cook: Clause 207 could be amended to say that the administrator may apply to the court to have certain restrictions put on this person.

Senator Flynn: It is strange, because it is better to be a bankrupt than a deemed bankrupt.

Mr. Howard: Except that a bankrupt has all his assets stripped away. He has an exemption of only $3,000, whereas the deemed bankrupt has constraints placed only on his capacity to carry on business.

Senator Flynn: If you are a bankrupt you can get out of it 90 days afterwards. If you are only a deemed bankrupt it lasts for five years.

The Chairman: That is right.

Senator Flynn: Where is the logic in that?

Mr. Landry: The difference is that in the case of a deemed bankrupt you must go to the court.

Senator Flynn: A bankrupt may have acted in the same way as the agent.

Mr. Landry: In that case a caveat will be filed against him if the facts are the same. If the administrator takes the trouble to go to court to have the status of a bankrupt or a deemed bankrupt apply, surely he would file a caveat also in similar circumstances.

The Chairman: Mr. Landry, if the agent is held responsible and there is a judgment in connection with the

deficiency, that is a penalty. You want a further penalty. You want him to be declared a deemed bankrupt. What is a deemed bankrupt? What is the difference between a bankrupt and a deemed bankrupt?

Mr. Landry: I agree with the suggestion made earlier. Maybe we should not characterize that person as a deemed bankrupt but impose restrictions upon him. The difference is that it has no effect on his assets. He is restricted pursuant to clause 210 to clause 217 in doing certain acts, such as doing business on credit, being appointed a director of another corporation, or acting as agent generally. Those are the only penalties imposed on what is today a deemed bankrupt.

The Chairman: First of all, I do not like "deemed bankrupt."

Mr. Landry: I agree.

The Chairman: It is a distortion.

Senator Walker: Did that come from the organization that drafted the new bill? Surely you did not put that in?

Mr. Howard: The draftsmen follow our instructions, and when something obnoxious is in there we have usually recommended it.

Senator Walker: It would be just as well to put "a" in there instead of "e".

The Chairman: If in those circumstances the penalty is that a court may impose restrictions on carrying on business.

Senator Flynn: According to the circumstances. I think it would be better. There was fault; the agent paid, and really there should be no penalty or restriction on his future activities. However, under other circumstances there should be. It seems to me it should be reviewed probably in this perspective. The administrator could ask for an order restricting him and not call him a deemed bankrupt.

Senator Cook: One can see the rationale of clause 207. After the minister gets in, after four or five years he finds this man has been doing this repeatedly. Under clause 176 the court just deals with the case before it. The minister finds this fellow has been doing it over and over again. Therefore, he should have the right or the duty to apply to the court to have him put under restrictions over and above his liability. I can see the sense of that.

Mr. Baird: If the restrictions were made flexible the court would be given a variety of restrictions that could be imposed. At the present time there is no flexibility at all; you are either a deemed bankrupt for five years or you are not.

Senator Flynn: That is it.

Senator Cook: It is a first shot at it. We agree with the principle but not the way it is done.

The Chairman: One restriction could be that he would be ineligible to be a director of any public company.

Senator Cook: He could not become a senator. That is another restriction.

The Chairman: I would prefer to say a member of Parliament.

Mr. Howard: I do not want to get into the house details. However, I would like to make it clear that this is directed not at the director of a public corporation, but particularly at the director of the small closely held corporation, particularly the one-man corporation, where the man uses this device again and again. Criminal misconduct cannot be proved, a fiduciary breach cannot be proved. He is either competent or a very sharp dealer, and we think there should be some restraint. At least the court should be able to impose some restrictions.

Senator Flynn: You do not say in here that he is a "sharp dealer." Anyone coming under clause 176 and clause 177 would be deemed, according to you, to be a sharp dealer.

Mr. Howard: No. Under section 209 we have the implied "sharp dealer" standard.

The Chairman: I am not sure it is.

Mr. Baird: He could be incompetent.

Mr. Howard: He could be incompetent, he could be potentially marginally dishonest but we cannot prove it; we only know that he has a record of repeated bad conduct.

Senator Flynn: That is why the question of flexibility and restriction should be looked into. I think you should examine that and possibly make some recommendations.

The Chairman: You mean incompetency will be the penalty for some person who is a deemed bankrupt?

Senator Flynn: The idea would be that in such a case the administrator would ask the court to make an order imposing some prohibitions, but it should be at the discretion of the court in order to be able to take into account the circumstances of the case.

Mr. Zwaig: Mr. Landry, yesterday you mentioned, when you were dealing with the $2,000 super security to the wage earner, that you had made a study of the systems in England and France. Are there any jurisdictions where they impose a status such as this, or restrictions such as these? What has the experience in those countries been?

Mr. Landry: Yes, I know of other jurisdictions where it has been done. England is one of them, France is another, and I understand this exists in most European countries. These countries have given a tool to public officials in order to get rid of those who abuse the credit system.

The Chairman: "Get rid of them," what do you mean by that?

Mr. Landry: Preventing them from being directors or officers of corporations, and setting up new corporations or dealing on credit. Those are limitations imposed on them.

The Chairman: You would suggest that those limitations be put in the bill as various forms of restrictions the court might impose?

Mr. Landry: The court, yes.

The Chairman: Depending on the nature of his conduct leading to the bankruptcy?

Mr. Landry: That is correct.

The Chairman: It seems to me that it is a much better way of dealing with it than to talk about this business of a deemed bankrupt.

Mr. Landry: I agree.

Senator Walker: It would just make about as much sense to call him a damned bankrupt.

The Chairman: Any other questions?

Mr. Baird: I have a question concerning the words "primarily responsible for the bankruptcy." If it is a single director or a single shareholder company, is there any circumstance where he would not be primarily responsible for the bankruptcy? That is in section clause (a)(i).

It is my impression that these words are too broad. They would catch every person who is managing or has managed a bankrupt company. Responsibility does not automatically involve culpability.

Mr. Howard: Mr. Baird, you are quite correct in saying it is too broad but can you recommend how that particular standard could be qualified? We do need some such standard, particularly to catch the case I mentioned where somebody abuses the incorporation process, repeatedly going through a series of corporate shells.

The Chairman: Perhaps you should use the words "culpable responsibility."

Mr. Baird: I would almost say "and" any of the circumstances set out in clause 200 may be attributed to the agent or the former agent rather than "or." Clause 200 is in fairly broad language. It covers a number of culpable acts. I am not sure you want to leave it wide open. A person should be in a position to know what his responsibility will be.

Mr. Howard: Again, without having had time to reflect on it, I am not sure. I agree with you and your recommendation. I would appreciate some time to reflect on it.

The Chairman: Unless there are further questions, we can proceed to the next point. We know the problem and we have a pretty good idea of what we are going to do with it.

Mr. Baird, do we have another point to develop?

Mr. Baird: The next point we can deal with fairly briefly, and that is the discharge of a bankrupt, and what debts should be released on the discharge of a bankrupt.

The major change in the new bill is that debts incurred as a result of fraud are now going to be released as a result of bankruptcy. The section dealing with discharge of the bankrupt and the release from a debt incurred as a result of fraud is section—I am sorry, you have to refer back from one section to another.

The Chairman: While you are looking for that, I might call the attention of the committee to clause 217. In dealing with penalties, I see that a bankrupt shall forthwith resign from the board of directors of the corporation.

Clause 217 states:

> No person who is a bankrupt shall be elected or appointed a director or an officer of a corporation.

If they simply said no person who is a bankrupt or who is an agent, culpable or responsible under section 209, shall be a director in a corporation—it does not require many changes.

Mr. Baird: That would be a relatively simple amendment.

Senator Flynn: Is that the only restriction you want to impose?

Mr. Baird: That would be only one of the restrictions.

Senator Flynn: From a drafting viewpoint, it would be better to have a section dealing especially with the penalty that you want to impose on the so-called "deemed bankrupt."

The Chairman: I agree with that.

Senator Cook: There are also differences in offences. Some fellows may not be, shall I say, as blameable under clause 176.

The Chairman: You mean they may have been just a little naughty.

Senator Cook: They are punished enough when they make up the debts.

Senator Flynn: It is not like pregnancy.

Senator Cook: Perhpas they were over-optimistic.

Mr. Baird: Mr. Chairman, Mr. Howard has given me the section, and thank you very much.

Clause 233 is the section that relates to claims against the estate, and lists the claims from which a bankrupt is not released. They include a fine or penalty imposed by a court; a debt arising out of a recognizance or bail bond; or a liability to pay maintenance and support in respect of another person for a period subsequent to the date of bankruptcy or the filing of the proposal.

Two debts which presently are not discharged in bankruptcy and not included in this section are; first, a debt incurred as a result of fraud, and, second, a debt for necessaries of life. Under the present Bankruptcy Act these two additional debts would not be discharged.

Mr. Landry, could you explain the reasons for the change in the bill?

Mr. Landry: Yes. With respect to the moneys obtained through fraud, by a bankrupt, it was felt that if there was fraudulent conduct on the part of the debtor, he should be punished under the relevant provisions of the Criminal Code, or the Bankruptcy Act, because his actions were criminal in nature. It would have no effect upon whether or not he receives a discharge from his debts.

With respect to the necessaries of life, in researching that, the main reason why this was put in the act in 1919 was that if merchants would know that the debt could be released on bankruptcy, they would not sell clothing, they would not sell fuel or other necessaries of life on account of the possibility of those debts being released.

It is thought that maybe today people do not consider the release of debt as being a serious reason for not selling necessaries of life to debtors. Those are the two main reasons.

Senator Flynn: I am more convinced by your argument about the necessaries of life because nowadays, with the credit system extended to everyone at all levels, it is up to the merchant to protect himself.

With regard to fraud, it is not very convincing when you say that he can be penalized under the Criminal Code or under this act. You are giving him a chance, that exists in civil recourse, to relieve himself of this liability.

Mr. Landry: Yes. It is thought that a debtor should not remain liable for a large amount of debts after going through the process of bankruptcy. If we assume that he is being examined as to his conduct, if he is practically stripped of all his assets which are distributed to his creditors, it is felt that any other penalty should be, if he has acted criminally, a criminal penalty, rather than a civil one.

Senator Flynn: Who is going to charge him with the criminal offence? The trustee would not bother to undertake expenses for that purpose, there is no doubt about that.

Mr. Landry: The creditors might be interested.

Senator Flynn: But such a creditor would realize that he would not get anything out of the estate because he would be classified in exactly the same way as any other creditor, and he would have no interest in it either, unless it is merely to take revenge of some kind; but he is not going to risk any money for that purpose.

Mr. Landry: Well, the public authorities have the duty and responsibility, also, to make sure of that.

Senator Flynn: Yes, if they receive the information, and if somebody requests that a charge be laid; but you know how bankruptcy works, of course.

Mr. Howard: Mr. Chairman, may I say something? I apologize for intruding upon the questioning.

Senator Flynn, I do not see exactly what you are driving at. Are you concerned about a judgment outstanding, say, for damages for fraud committed by the debtor against one of his creditors?

What we are concerned about is, for example, a situation in which three years before the debtor got into this mess, he was a stock salesman and had a judgment against him, with regard to some fraudulent dealing in connection with stock. It was not criminal misconduct, but there is a judgment against it. The policy reflected in this bill is that that is not too different from a negligence action. Agreed, it was an intentional délit that resulted in a judgment against him, but at the stage when he is going into bankruptcy, and is giving up all his assets, or very nearly all, as far as possible we should wipe the slate clean and allow him to begin again.

Would it satisfy you if we had something in here to the effect of its being a fraud that somehow relates to the reason for his becoming a bankrupt?

Senator Flynn: What I was refuting was the argument of Mr. Landry that there are penalties provided in the Criminal Code and in this act; but what I am saying is that it is very seldom that you see a bankrupt charged under the Criminal Code for something that has happened previously. No one is interested in doing that. I mean, this is not a cure. It does not destroy the principle laid down by Mr. Howard that if judgment has been obtained three years before, and no one has done anything about it, perhaps his claim should be considered in the same light as any other; but that is something else.

The Chairman: Would you permit the fraud to fall in relation to the bankruptcy? I mean, if the person who becomes bankrupt had been guilty of some kind of fraud, and had been prosecuted for it, and subsequently became bankrupt, although not because of the fraud, what is his position? Should he not be covered by this?

Senator Flynn: What I was discussing was the argument of Mr. Landry. I will now put that aside.

Mr. Landry: May I just try to add to the argument I have made? If we look at clause 200, which is the clause that provides the guidelines for filing a *caveat*, one of the cases dealt with is where credit was obtained through a fraudulent misrepresentation. In that case a *caveat* would be filed against the debtor, and in those circumstances, after-acquired property may be obtained for the benefit of all the creditors, including the victim of the fraud, but he would not have a special status. This provision in fact gives him a much better position than that of a secured creditor. The debt is not wiped out, and it is felt that if there is fraud, a *caveat* should be filed and after-acquired property should be brought in.

Senator Flynn: But if you were to provide, in a case where a *caveat* is filed, that the court may order a bankrupt to pay a certain person to discharge a debt resulting from fraud, then you would go half way, whereas now you are going all the way. Before he was never discharged, but now he is completely discharged, or his claim is put on the same level as any other claim.

Mr. Landry: I wonder if a "preference" should be given to that type of creditor for that reason? I think the criminal sanction is one of them, the *caveat* is another. For the gereral benefit of all creditors after-acquired property could be brought in and distributed eqfitably among all of them.

Mr. Baird: I do not know the answer to your problem, and you have outlined it very well, but the point is that the person who suffers a debt as a result of fraud is not a willing victim. He did not extend credit as a normal creditor would.

Mr. Landry: It is the same thing for the victim of a car accident.

Mr. Baird: Pardon me. I said "unwilling victim". I should have said, "unwilling creditor". Should he be treated any differently from the willing creditor, or the creditor that volunteered credit? It is a very difficult question.

Mr. Landry: I am sure there are many, many unwilling creditors, and that would be a very wide category to give a preference to.

Senator Cook: If you strip a man of all his assets, and so forth, and give him a fresh chance, in that case, looking at the other side of it for a moment, and putting on the other hat, are not subclauses (a) and (b) too rigid? In other words, the court can fine a man who is fairly prosperous, and then he goes bankrupt, for example. Why should he have to pay the fine?

Mr. Howard: Is that clause 200?

Senator Cook: No. It is clause 233. We were talking about a bankrupt being released from certain debts, were we not?

Mr. Howard: Yes. That is correct.

Senator Cook: Clause 233 says:

Notwithstanding anything in this Act, no claim is admissible for, and no bankrupt or person who makes an arrangement is released from,

(a) a fine or penalty imposed by a court;

(b) a debt arising out of a recognizance or bail bond; or—

Such a person's whole circumstances change after he goes bankrupt. He might be fined $5,000 and suddenly things go wrong, and he is now bankrupt. Why should there not be some flexibility about being released from a fine or a debt in those circumstances?

The Chairman: How do you release a man from a fine which a court has imposed?

Senator Cook: Why not give the court the opportunity to review it in the light of the circumstances of the case? A bankrupt's circumstances could change. He could be involved in a customs fraud, or an income tax fraud, and may be fined $5,000, or even $10,000, and all of a sudden he is bankrupt.

Senator Flynn: A fine is in no better position than a claim for income tax.

Mr. Baird: It is sometimes the equivalent, is it not?

Senator Cook: I suggest that subclauses (a) and (b) might be looked at again, as being too rigid as they stand now.

Mr. Baird: Traditionally this section is here as an adjunct to a criminal punishment.

Senator Cook: We are talking about something irrespective of bankruptcy, you know.

Mr. Baird: Yes, but that is the purpose of this section, to enforce the criminal punishment of a fine and to make sure it is not released. That is a policy decision in the present Bankruptcy Act that has been carried forward into this bill, notwithstanding the fact that a man is stripped of his assets and given a fresh start. He is still required to pay a fine, because that is a criminal penalty. That is the justification for this clause.

Senator Cook: I know, but as I say, it does not go to the other side.

Mr. Zwaig: On the other side, yesterday, Mr. Landry, you mentioned that you are encouraging the individual to go into the arrangement scheme, as opposed to the bankruptcy route, and one of the claim not admissible in bankruptcy under the present act is for necessaries of life. Perhaps, by including that as a non-admissible debt you might swing more people into the arrangement scheme rather than into the last-resort bankruptcy scheme. Have you given thought to that?

Mr. Landry: Not in that light, no. I did not think that it might be an incentive for people to go the arrangement route if claims for necessities were not discharged in bankruptcy, and I would like to have a chance to think about that; but it does not strike me as being an incentive.

Senator Flynn: Coming back to the question of fraud, and claims resulting from fraud, it seems to me that if a person has only got that kind of liability the Bankruptcy Act should not offer a haven to such a person if most of the liabilities are of that nature.

Mr. Landry: You would, in other words, deny the right to bankruptcy to someone guilty of fraud, or who may be guilty of fraud?

Senator Flynn: I do not say that necessarily, but I say if most of the liabilities were of that nature, bankruptcy would offer relief to that type of person.

Mr. Baird: You are really suggesting, Senator Flynn, to have the bankruptcy annulled if the majority of the debts were incurred by fraud.

Senator Flynn: Something along those lines, yes.

The Chairman: I believe we follow that. Notwithstanding what our experts might say, I think this is a good time to adjourn. I would say that next Wednesday we expect to hear Mr. Bedell and possibly others representing the Canadian Institute of Chartered Accountants and the Toronto Board of Trade.

Senator Flynn: Is that with respect to this bill?

The Chairman: With respect to this bill. Possibly, also, The Canadian Bankers' Association. The only other submission that is standing in the wings is that of the Canadian Bar Association, which they wish to present during the first week of December. I have informed them that that is the limit, because we are determined to draft a report before the Christmas recess comes upon us.

Senator Flynn: That is our Christmas gift for the department.

The Chairman: Yes; that will be a special gift on the Christmas tree, presented with due ceremony to our friends.

Senator Cook: The policy relating to gratuities does not apply to this.

The Chairman: Next week we will sit on Tuesday morning and, on the assumption that the income tax bill will be before us, we will deal with it at 9.30. I understand that when the Senate adjourns today it will do so until Monday evening and adjourn after that sitting until Tuesday afternoon. We will obtain permission to sit on Tuesday afternoon, so we will consider the income tax bill first thing Tuesday morning. Then I have offered the Minister of Consumer and Corporate Affairs time at either 11.30 Tuesday morning, or 2.30 Tuesday afternoon. Whichever time he takes, the remainder of that day will be taken up by consideration of the anti-inflation reference. We will not sit on Tuesday evening. We then sit on Wednesday to continue with the bankruptcy bill and hear further from these witnesses. We must then get to the business of the reports on Bill C-2 and the bankruptcy bill. The subject of anti-inflation will be continued until the bill arrives here, which I anticipate will be during the following week, but maybe I am being optimistic.

Senator Flynn: It depends on how flexible the government will be.

The Chairman: That is correct, but we must make plans sometimes ahead of time.

Senator Cook: It depends also on how exhausted this committee will be.

Senator Flynn: Or the house.

The committee adjourned.

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FIRST SESSION—THIRTIETH PARLIAMENT
1974-75

THE SENATE OF CANADA

PROCEEDINGS OF THE
STANDING SENATE COMMITTEE ON

BANKING, TRADE AND COMMERCE

The Honourable SALTER A. HAYDEN, *Chairman*

Issue No. 63

TUESDAY, NOVEMBER 25, 1975

Complete Proceedings on Bill C-65 intituled:

"An Act to amend the statute law relating to income tax, (No. 2)"

REPORT OF THE COMMITTEE

(Witnesses: See Minutes of Proceedings)

29740—1

THE STANDING SENATE COMMITTEE
ON BANKING, TRADE AND COMMERCE

The Honourable Salter A. Hayden, *Chairman*

The Honourable Senators:

Barrow	Hayden
Beaubien	Hays
Buckwold	Laird
Connolly (*Ottawa West*)	Lang
Cook	Macdonald (*Cape Breton*)
Desruisseaux	Macnaughton
Everett	McIlraith
*Flynn	Molson
Gélinas	*Perrault
Haig	Sullivan
	Walker—(19)

**Ex officio* members

(Quorum 5)

Order of Reference

Extract from the Minutes of the Proceedings of the Senate, November 20, 1975.

"Pursuant to the Order of the Day, the Senate rsumed the debate on the motion of the Honourable Senator Hayden, seconded by the Honourable Senator Bourget, P.C., for the second reading of the Bill C-65, intituled: "An Act to amend the statute law relating to income tax, (No. 2)".

After debate, and—
The question being put on the motion, it was—
Resolved in the affirmative.

The Bill was then read the second time.

The Honourable Senator Langlois moved, seconded by the Honourable Senator Benidickson, P.C., that the Bill be referred to the Standing Senate Committee on Banking, Trade and Commerce.

The question being put on the motion, it was—
Resolved in the affirmative."

Robert Fortier,
Clerk of the Senate.

29740—2

Minutes of Proceedings

Tuesday, November 25, 1975
(82)

Pursuant to adjournment and notice the Standing Senate Committee on Banking, Trade and Commerce met this day at 9:30 a.m.

SUBJECT: *Bill C-65—"An Act to amend the statute law relating to income tax, (No. 2)".*

Present: The Honourable Senators Hayden (*Chairman*), Beaubien, Connolly (*Ottawa West*), Cook, Flynn, Haig, Laird, Lang, Macnaughton, McIlraith and Walker. (11)

In attendance: Mr. A. Peter F. Cumyn, Advisor to the Committee.

WITNESSES:

Department of Finance:

Mr. M. A. Cohen, Assistant Deputy Minister, Tax Policy; and

Mr. A. E. J. Thompson, Director, Corporations & Business Income.

Revenue Canada; Tax Policy Division:

Mr. D. L. H. Davidson, Director-General.

The Committee proceeded to the consideration of the Bill and the examination of the witnesses.

Following discussion, and upon motion, it was *Resolved* to report the said Bill without amendment.

At 11:25 a.m., the Committee adjourned until 2:30 p.m. this day.

ATTEST:

Frank A. Jackson,
Clerk of the Committee.

Report of the Committee

Tuesday, November 25, 1975

The Standing Senate Committee on Banking, Trade and Commerce to which was referred Bill C-65, intituled: "An Act to amend the statute law relating to income tax, (No. 2)", has, in obedience to the order of reference of Thursday, November 20, 1975, examined the said Bill and now reports the same without amendment.

Respectfully submitted,

Salter A. Hayden,
Chairman.

The Standing Senate Committee on Banking, Trade and Commerce

Evidence

Ottawa, Tuesday, November 25, 1975.

The Standing Senate Committee on Banking, Trade and Commerce, to which was referred Bill C-65, to amend the statute law relating to income tax (No. 2), met this day at 9.30 a.m. to give consideration to the bill.

Senator Salter A. Hayden (*Chairman*) in the Chair.

The Chairman: Honourable senators, we have for consideration this morning Bill C-65, and we have with us several departmental officials, all of whom you know. They are: Mr. Cohen, Mr. Thompson and Mr. Davidson.

I mentioned to Mr. Thompson yesterday certain subject matters with which I would like to have them deal. I suggested, first, the resources allowance; then the transfer of the $1,000 of interest and dividend income from a dependent spouse who does not spend all or any of it; then the registered retirement savings plan and how that is dealt with; and then the investment 5 per cent tax credit. There are several others where the difficulties do not appear to me to loom so large. With that in mind, we propose starting with the resource allowance. Which one of you will deal with that?

Mr. M. A. Cohen, Assistant Deputy Minister, Tax Policy, Department of Finance: Mr. Thompson will primarily deal with most of these, Mr. Chairman.

Mr. A. E. J. Thompson, Director, Corporations and Business Income Division, Department of Finance: Mr. Chairman, the resource allowance itself is found in clause 1 of the bill. The provision has two main purposes: one is to give a more direct recognition of the right of provinces to levy royalties on resources and obtain a deduction from income. The second is to provide a greater incentive for exploration and development in the way in which the resource allowance is calculated.

Honourable senators will recall that in the present Income Tax Act all the provincial resource royalties are disallowed. On the other hand, there is a special abatement from federal tax with respect to resource revenue which is in recognition of the special position of the provinces in relation to resources.

However, in the months before Bill C-65 was presented to the house, the government considered further the representations of the provinces about the need for some deduction directly from income. As a result, this resource allowance was formulated as an extra deduction from production income. At the same time, the extra abatement from corporate tax was removed so that the ordinary rate of corporate tax would apply to resource production income.

The Chairman: And that is 46 per cent?

Mr. Thompson: It will be 46 per cent in the next year, Mr. Chairman. For this year it is 47 per cent.

Senator Connolly: And that is a permanent feature, is it?

Mr. Thompson: Yes, that is right.

Senator Cook: Until the next amending bill!

Mr. Thompson: The second feature of this provision—and it comes up under later clauses of the bill—is the restoration of the regular rate of corporate tax, and the side effect of that is that exploration and development expenses will be deductible against the full rate of corporate tax. Consequently, after-tax costs to the companies in relation to exploration and development will be reduced.

The Chairman: The effect is that the income and profits will be reduced by the exploration and development expense?

Mr. Thompson: That is right, Mr. Chairman, and since it is against the higher rate of corporate tax it reduces the after-tax cost to the company.

The Chairman: You first referred to the "full rate" of corporate tax and now you have referred to it as the "higher rate" of corporate tax. Let's get down to figures. The corporate tax rate on taxable income—that is, the earnings less the exploration and development expense—for 1976 will be 46 per cent, will it?

Mr. Thompson: That is right, Mr. Chairman.

The Chairman: What you are doing so far as the corporate rate is concerned is putting petroleum and oil companies and the mining industry in the same position as other corporations, and they will follow the reducing corporate rate dowwards?

Mr. Thompson: That is right.

Senator Connolly: And the minimum rate will be 46 per cent, will it not?

Mr. Thompson: Yes, it will level of at 46 per cent, next year.

Senator Connolly: Reverting for a moment to the resource allowance, in making the calculation with reference to the corporate tax, after deducting the exploration and development expense from the gross earnings, I gather that you will have previously made the calculation with reference to the resource allowance. Is that so?

Mr. Thompson: The resource allowance is calculated before deducting the exploration and development expense.

Senator Connolly: Perhaps I am anticipating what you are going to say, but to calculate the resource allowance you take the gross income from the resource and deduct

from that such things as depreciation, depletion and other normal operating expenses?

Mr. Thompson: Not depletion, Senator Connolly; the earned depletion comes after.

Senator Connolly: I see. But after deducting the normal operating expenses from the gross income from the resource, the resource allowance is then 25 per cent of the result?

Mr. Thompson: Yes.

Senator Connolly: In terms of the allowance to the producer, I have heard it said that the amount is the equivalent of 10 cents in the case of gas per thousand cubic feet. Is that a fair way of putting it? I do not say it is, but I have heard it said that that is the net result. Is that so?

Mr. Thompson: I cannot say offhand, Senator Connolly, in relation to gas. In rtelation to oil, if you take the industry as a whole, the resource allowance would be roughly equivalent to the amount of the old style royalty of 20 per cent of gross. It is of that order.

The Chairman: Mr. Thompson, you will no doubt recall that when we were considering Bill C-49 we had representatives from the Canadian Petroleum Association before the committee. On their first appearance they did the arithmetic on the basis of the then situation as to what the Alberte levies were and the effect on the income and profit of the industry by reason of the disllowance of the royalty deduction. About a month after that hearing, the Province of Alberta presented a new deal on royalties in relation to the industry. As a result of that new deal, we invited the Canadian Petroleum Association back before the committee, at which time it presented new figures. I think the association correlated what the basic royalty was, say, as at December 31, 1973, arriving at a figure of 24 per cent.

The position then put forward by the committee, I believe, was that that element should be recognized as a basic royalty and should be allowed, in any event, even though the minister had described the tremendous increase in the provincial rate as being of an income tax character.

The comparison now is that by reason of this resource allowance, looking at it as a royalty, the industry will be getting the equivalent of 22½ per cent.

Mr. Thompson: It is in that order, Mr. Chairman.

The Chairman: So, the industry is getting fairly close to what was enjoyed before the Alberta and federal authorities got into the game, as I would call it, of playing with royalties.

Senator Connolly: In other words, it is putting that much more money in the hands of the producer.

Mr. Thompson: In tax revenue terms for the industry as a whole, Senator Connolly, there will really be very little change as a result of this resource allowance and the change in tax rate. However, there will be a change in the impact on specific companies. For example, a company that tends to explore and develop more than the average will find this attractive.

Senator Connolly: The proviso is that if you use your money to explore and develop, then these benefits will be available?

Mr. Thompson: Yes.

Senator Connolly: It is a fairly complicated, detailed kind of thing. From the point of view of determining how much per mcf, or per barrel, it means to the industry, you have gone about it backwards? The industry, I suppose, would look at it from the point of view of how much it would get as a result of exploration and development.

The Chairman: Or how much less will it get if it does no exploration and development.

Senator Connolly: That is right, Mr. Chairman.

The Chairman: Mr. Thompson, in explaining this bill on second reading in the Senate I referred to a table entitled, "Sharing of $1.50 price increase in barrel of oil under modified system and including Alberta's royalty reduction." This table was part of the material provided to me for the purpose of introducing this bill in the Senate. I was asked whether that was a supported figure. What is your comment on that?

Mr. Thompson: It is supported in the sense that the estimated breakdown is based on the best estimates that we could make for the industry as a whole. It is very difficult to be precise in those estimates, as you can appreciate, but it is derived from the best statistics and estimating that we could do for the industry as a whole as it would operate in Alberta.

The Chairman: And that is recognizing the mix in the figures, the mix being those who carry out exploration and development and those who do not, all of whom are compiled in this table, which appears at pages 1418 and 1419 of Senate *Hansard* of November 18, a copy of which you have before you, Mr. Thompson.

Mr. Cohen: That table can easily be supported. Whether a company can actually behave in precisely that way is another proposition. The figures in that table are straight mathematical calculations; there is no great difficulty. What they were designed to show was the difference in impact for a company that did no exploration and development compared with one that spent every possible dollar it could, what we call the maximum exploration case. I doubt if any company spends no money on exploration and development. Similarly, no company spends every possible dollar on exploration and development. To illustrate the point that table was prepared, and the figures in the table are quite accurate. It is a straight application of the tax system, with existing royalty regimes too.

The Chairman: In one part of it you assume that there was no exploration and development; in the other part you assume that the $1.50 of the increase in price was spent entirely on exploration and development. Out of that there are two sets of figures showing the result. Neither one may actually happen and produce this result; that is, every company is bound to spend something on exploration and development, and therefore your figures, based on no exploration and development, will be lower than practical experience will show. No companies are likely to go as far as your figures showing a spending of $1.50 per barrel on exploration and development. Therefore, the figures produce something higher than they will actually experience.

Senator Connolly: They are the two extremes.

The Chairman: Exactly. Another question brings me to something that concerns me. Mr. Thompson, you referred

to clause 1, which is the authority for the resource allowance. You will notice it says:

> such amount as is allowed to the taxpayer for the year by regulation in respect of oil or gas wells in Canada or mineral resources in Canada.

The language is "by regulation". My understanding is that those regulations have not as yet been enacted.

Mr. Thompson: No. As you are aware, the usual procedure with regulations would be to issue them after the bill has been passed into law. In fact, the law has to be in place before there is authority to issue the regulations.

The Chairman: But there have been instances where draft regulations have been issued.

Mr. Thompson: Yes. In this case the significant elements of the regulation are really contained in the minister's budget speech. It was felt that that provided enough information to the industry to pretty well let them know how it would work.

The Chairman: There is no statutory commitment in the absence of regulations.

Mr. Thompson: No. You need the regulation to give it the force of law.

The Chairman: Maybe not on this bill, but some time, somewhere we will have to deal with this. We have been pecking away at this business of the authority that is taken by the actual regulation when it is enacted. Perhaps we will extend our scope to saying that there should be at least draft regulations so that their workings can be understood. In this case, what the minister did was to give the contents of what the regulation would be in his budget speech when he was highlighting it. That is the only commitment. It was a commitment to the House of Commons. I notice that the whole debate in the House of Commons proceeded on the basis that the resource allowance was 25 per cent.

Mr. Thompson: Yes. This would be along the lines of precedent, such as the present earned depletion allowance, which is structured in the law in much the same way.

The Chairman: This may or may not concern you, but what I am saying is that we are aware of the situation and it bothers us. At some time we may reflect the fact that we are bothered, picking a proper case, of course.

Senator Connolly: I should like to carry this a little further. This seems to me to be a combersome way to do it. If an allowance on account of tax is to be fixed, the normal way to do it is by amending a section in the act. Why in this case do you do it by regulation?

Senator Cook: So that they can take it back more easily!

Senator Connolly: It is obviously something that can be changed without going to Parliament. Normally we expect tax changes to be effected as a result of the budget speech. Is there any special reason why you should use the vehicle of regulation here rather than have it in the act?

Mr. Cohen: Let me try to answer that question for you. I suppose it is in part a policy question; it is an attitude on the part of governments from time to time, so I cannot really give you a definitive answer.

Senator Connolly: We would not press you on policy.

Mr. Cohen: One is always balancing two propositions. On the one hand, one is getting as much as possible into the statute, which is subjected to the scrutiny of both houses and has the force of a statute. On the other hand, there is the difficulty of dealing with very complicated, technical provisions. I concede that in advance. The more that is put into the statute the more complicated the statute becomes.

The Chairman: You mean that is possible?

Mr. Cohen: Senator, you haven't seen anything yet! Perhaps I could digress for a moment to say that I have just returned from the Canadian Tax Conference where I listened for three days to everyone complaining about the complexity of the statute, so I am very sensitive on this issue.

Senator Connolly: If you acceded to that and put everything into the statute they would say, "There is a better way to do it. Take it out of the statute."

Mr. Cohen: That is the balance we are continually trying to strike. On any given issue I suppose it can always be argued that if we put it in the regulation we ought to have put it in the statute, and that if we put it in the statute we ought to have put it in the regulation.

Senator Cook: Take it out of the complex statute and put it in the complex regulation!

Mr. Cohen: That is the dilemma we are always facing. There are many parts of the rules of the game, if you will, which are very technical and need to be changed, not in the major policy sense of being withdrawn, but which need to be adapted to changing conditions.

Senator Connolly: I do not want to be devious about this, but does the fact that it is in the regulation pose a threat to the provinces with reference to the take of the producers? They have virtually allowed as a deduction the royalty rate that we used to charge here, but they are doing it in another way. They can change it tomorrow. Do they say that?

Mr. Cohen: I have not heard that particular comment made by any provincial representative. There does not seem to be a concern by the provinces that because it is in the regulation it is a little less solid than if it were in the statute.

The Chairman: For your information, Senator Smith (Colchester) who spoke on the bill in the Senate, referred to clause 1(2)(b) which says:

> notwithstanding any other provision contained in this Act, the Governor in Council may prescribe the formula by which the amount that may be allowed to the taxpayer by such regulation shall be determined.

If you are looking for flexibility, in order to manoeuvre, in varying the regulations and the amount to be allowed as a resource allowance, you have all the scope in the world in that provision in the bill. Is that not right?

Senator Connolly: That is right; but that is a matter of policy.

The Chairman: Mr. Cohen can take care of himself.

Senator Connolly: We do not want to be discussing policy. You are right, Mr. Chairman, you have the flexibility; you can change the rate to 15 per cent simply by changing the regulation.

Senator Laird: Mr. Chairman, isn't the big problem that it removes all opportunity for debate on the amount? At the moment it is 25 per cent and, as Senator Connolly pointed out and as you have pointed out it is quite capable of being changed.

The Chairman: The formula can be changed to produce a higher percentage result or a lower percentage result.

Senator Laird: Without debate; that is the point I am getting at. It is a matter of information. In case anybody here is labouring under the illusion that the Standing Joint Committee on Regulations and Other Statutory Instruments has any jurisdiction on this question, believe me, they do not. They have no jurisdiction to do anything else than to make sure there is power under the act to pass the regulations, and that there is no other is regularity. They have no power to debate the matter of, say, 25 per cent in this case or anything like that. So, you remove entirely the opportunity for debate.

The Chairman: If you added one word, I would agree with you. There is no "effective" way by which you can change action that may be taken under the bill, to change the rate. I say no "effective" act. You can certainly provoke public debate in Parliament.

Senator Walker: Yes.

The Chairman: That is as far as you can take it.

Senator Cook: The other side of the coin, Mr. Chairman, is that these things are in the field of economics and have changed very quickly. It seems to me that where the government wants to change its policy, and put rates up and down, you are going to get into great difficulty securing parliamentary time and consideration. To my mind, this is a proper case for regulation.

The Chairman: If there is one industry that has that very ability of shifting up and down, although mainly it has been operationally, that is the oil and gas industry.

Senator Flynn: I do not see why it would be more difficult to change these provisions, by proper legislation, than any other provisions of the Income Tax Act. Your rate of income tax is changed every year. It is not so difficult. It takes parliamentary time, but it is the proper place for it.

The Chairman: The only problem, of course, is time.

Senator Flynn: I beg your pardon, Mr. Chairman?

The Chairman: The only problem, if you put it in the statute, is that it may take longer to make a change.

Senator Flynn: If you accept that argument, that you can just give a blank cheque to the government in all fields of income tax, then the government can decide without Parliament next year that you are going to pay 75 per cent instead of 50 per cent.

Senator Cook: Except anyone hit can ask questions in debate.

Senator Connolly: There is one other element here, Mr. Chairman, as you and Mr. Thompson have pointed out, there is a commitment in the budget speech. I suppose what you are really saying is this is a matter of bona fides. We are doing it this way. Frankly, I do not like it as well from the point of view of a taxing instrument. I do not think anyone on the committee does. Perhaps even the officials do not.

Senator Flynn: It is good for one year.

Senator Connolly: It gives it a degree of permanence.

Senator Flynn: Not one year. We have seen a minister reversing his stand, from one budget speech to another, within the space of six months. What is that commitment worth? You know today it is this, but tomorrow it will be something else. As far as the industry is concerned, I suggest it is not satisfactory at all.

Senator Lang: Perhaps this debate should take place in the other place in view of the constitutional disability under which we are labouring here, Mr. Chairman.

Senator Flynn: I do not know if that is really the problem here. It is a problem of drafting; it is a problem of policy. Maybe we cannot change it; I do not know. I have not studied that particular point. It is certainly a problem of policy that is of interest to us, the way the government proposes legislation in the field of income tax.

The Chairman: We stated the pros and cons of the situation before you came in, Senator Flynn. I did indicate that some day this committee may get so concerned about the way regulations are being dealt with—in this bill, as an example, and in other bills the example is different—the regulations really giving the power to legislate, and if we get our dander up enough, look out!

Mr. Cohen: Perhaps at the next meeting we will have the minister here, Mr. Chairman!

Senator Connolly: Could I ask the witness, Mr. Chairman, if they received any flak on this point in the committee of the House of Commons?

Mr. Thompson: No, senators, I do not think there could be anything termed as "flak" on this particular aspect.

The Chairman: Mr. Thompson, Mr. Cumyn has a couple of points he would like clarification on from you.

Mr. A. P. F. Cumyn, Adviser to the Committee: Can you confirm that the income serving as the basis for the calculation of this allowance will include provincial royalties and other amounts added back to the corporations income?

Mr. Thompson: Mr. Chairman, certainly in policy terms it will be included. Technically I would think the income from a source rules would have that result. In any event, that is certainly the effect that the regulations will have when they are issued.

Mr. Cumyn: Another question: Where the allowance is claimed, may it be claimed regardless of the profit position of the taxpayer, so that effectively there could result a business loss, a non-capital loss that could be carried back and foward in accordance with the rules of section 111?

Mr. Thompson: Yes, Mr. Chairman.

Senator Connolly: I do not understand that question, Mr. Chairman.

Mr. Cumyn: Senator, it is really this: Having computed its income and then claiming this allowance, because of the fact that this allowance is based on an income which is determined before the deduction of an amount in respect of exploration development, it could be that both deductions taken together would put the taxpayer into a loss position. I just wanted to seek confirmation that these regulations would permit this to arise. This would be the normal

result, permitting a loss to be created that could be carried back and forth.

The Chairman: Permitting the loss to be carried forward.

Mr. Cumyn: Yes.

Mr. Thompson: Mr. Chairman, that could be the effect of this allowance. Actually, Bill C-65 indicates this because the resource allowance is under the part of the act that has the usual deductions from income in it; just as, in the same way, other deductions under that part resulted in a loss, therefore, also the resource allowance.

Mr. Cumyn: Would you have an idea when the regulations would be published?

Senator Connolly: It is inconceivable to me that where you are making provision for an allowance that you are creating a loss position. Maybe I am just not understanding this morning, but I cannot put my mind to it.

Mr. Thompson: Senator Connolly, it is easier to understand if you look on it as a quasi-substitute for a deduction of royalties; in other words, if you had deductible royalties of the same amount, then it would naturally follow that you could create a loss by paying royalties.

Senator Connolly: Yes, all right. Thank you.

Mr. Cumyn: Mr. Chairman, one final question: When would these regulations be published, in your expectation?

Mr. Thompson: They should be published very soon after the bill is passed. They are virtually in final form now.

The Chairman: The next point, Mr. Thompson, has to do with the transfer of the dependant spouse's $1,000 exemption. Are you going to speak to that, Mr. Cohen?

Mr. Cohen: Mr. Thompson was wondering, Mr. Chairman, if I should speak to that because I gave a speech to the Canadian Tax Conference on that particular provision, simply as an illustration of how simple ideas turn into most complicated pieces of legislation. I took the opportunity to trace the history of that particular provision.

Senator Connolly: Will you start with what the normal exemptions are, please?

Mr. Cohen: With the normal exemptions, senator?

Senator Connolly: As between husband and wife.

Mr. Cohen: I will see if I can reconstruct all this. There is a basic exemption which every individual is entitled to. Then there is a marital exemption and there are exemptions for children. Those are really the three basic exemptions.

Senator Connolly: The basic exemption is $1,000?

Mr. Cohen: No, it is an indexed number now. I cannot remember what the exemptions are at the moment, but I believe the basic exemption is $1,600 or $1,700. The marital exemption adds on to that about $3,200 or $3,300. These are off the top of my head numbers. The children's exemptions are $300 per child under 16 and $500 for 16 and over. Those are all indexed numbers and they change annually now. Those are really the three basic exemptions. There are a number of other exemptions and deductions.

Senator Connolly: For this purpose that is all you need, I think.

Mr. Cohen: I am not sure where you are heading with your question, senator.

Senator Connolly: Okay. Let me not interfere again. You go ahead.

Mr. Cohen: There is a long history to this provision. The government started off some time ago by introducing an exemption on the first $1,000 of interest that individuals received. The policy motivations behind that were relatively straightforward and were well understood in a period of rising inflation. There was an effort here to protect people with modest amounts of investment income from the damage that inflation can do, so the government started off with $1,000 exemption for interest alone. At a later stage that $1,000 exemption was expanded to include both interest and dividends, all swept together into the $1,000 exemption. In addition, there was another deduction introduced in respect of the first $1,000 of pension income as well.

The particular problem this bill is addressing itself to is really the following kind of situation: Take the case of a family unit in which there is only one income-earner, say the husband, who is earning $10,000 of wage income and has $1,000 of interest income. The proposal would exempt from tax the $1,000 interest income. But the situation may also exist where he has $10,000 of wage earnings, and not he but his wife has $1,000 of interest income or dividend interest or pension income. The difficulty with respect to that was that that $1,000 of interest income in the spouse's hands could have a peculiar effect because, as you know, the spouse's exemption—that is, the exemption which the husband can enjoy in respect of his wife—is reduced as a result of her income. The more income the wife has, the less exemption the husband can claim in respect of her. After all, she has income. That is a perfectly understandable proposition. But a difficulty began to turn up. Here we were saying that the $1,000 of interest income was to be exempt, but, unless we did something, in effect we would be denying that $1,000 of interest in the wife's hands because it would be reducing her marital exemption. Suppose the marital exemption was $1,700—and please let me simplify these numbers just to get at the principle of the problem; I would be able to deduct $1,700 in respect of my wife. If she happened to have $1,000 of interest income, although it is not taxable in her hands barring some other action, it would reduce the exemption that I could claim in respect of her from $1,700 to $700.

I realize I have skipped over certain technicalities, Mr. Cumyn. I am sure you will not pick me up on those. That is the problem and that is really an undesirable situation.

Senator Flynn: There is another solution. Why not pool the incomes of spouses? Why not pool the exemptions?

Mr. Cohen: That would be a major solution to the problem, senator.

Senator Flynn: It would be the last one, so why not come to it?

Mr. Cohen: The government, initially, chose to try to deal with the situation by protecting that marital exemption, by restoring it to the extent that there was exempt interest, or dividends, in the wife's hands. In other words, we had a mechanism in the original proposal which said that that $1,700 coming down to $700 could go back up

again to $1,700. We would try to recognize the fact that there was $1,000 of exempt income in the wife's hands and not tax the other spouse as a result.

A great deal of complication ensued in this whole thing which I will spare you. The upshot of it all was that we finally gave up on that particular route. In this bill we are substituting what we hope is a simpler approach. Instead of trying to work this calculation off on marital exemption by letting it come down and rise again, we are saying, let the marital exemption come down, but the wife can transfer to the husband the benefit of that $1,000 interest or dividend exemption.

The Chairman: So the husband might end up with $2,000 of interest exemption or deduction.

Mr. Cohen: Conceivably, if he happened to have some of his own. Yes. That is what it is all about, in principle. It works out to be somewhat more generous in addition because of some of the complications in this thing. It enriches the interest deduction.

The Chairman: A joint return might simplify it.

Mr. Cohen: A joint return, Mr. Chairman, would obviously simplify that and a whole range of other questions.

The Chairman: That is right.

Mr. Cohen: On the other hand, it would raise a number of very fundamental policy questions.

Senator Laird: In any event, that is not included here.

Mr. Cohen: It is not in here, no, but if you wish a brief comment on it, it is something which, as officials, both departments are looking at. There is a great deal of interest in it. There are two main difficulties with a joint return: one is that it has tremendous fiscal implications; the second is that it is most difficult to find a joint return system under which you are not either taxing marriage or taxing being single. Somehow or other in a joint return someone has the edge, and that raises a range of political problems because someone is ahead of someone else. Either you are taxing marriage or you are taxing single status. So there are certain difficult questions to consider in the case of a joint return. In any event, that is beyond the scope of this particular bill.

The Chairman: The next point I raised with you, Mr. Thompson, was the registered retirement savings plan and the treatment of that in this bill.

Mr. Thompson: Mr. Chairman, this clause had two or three purposes. In the first place, it seems there has been some abuse, in that a taxpayer has been able to contribute more to pension plans than was really contemplated under the limits that were set.

Senator Connolly: Those limits now are what?

The Chairman: The lesser of $4,000 or 20 per cent of the employee's income.

Mr. Thompson: Perhaps I will let Mr. Davidson comment on this particular aspect.

Senator Connolly: Well, there is the further restriction that if you are a member of a plan, then the maximum is $2,500, is it not, less the amounts that you put into the plan?

Mr. Cohen: That is correct.

Senator Connolly: That seems to be the general rule. What you are talking about here are exemptions from income.

Mr. Davidson: Mr. Chairman, there are various problems here, and one of them is quite a simple one. Take the case of two taxpayers under an employer pension plan. In one case the employer did not contribute over the years to the plan, but at the end of the period of employment he put in a lump sum, whereas in the other, the employer contributed every year, and consequently, the two employees ended up with exactly the same pension. The person whose employer put in money for him every year would be restricted to $2,500 less his own contributions to the pension plan. The other man, in the terminally funded plan, could put $4,000 into his registered savings plan, and yet end up with the same pension. This man has a tremendous advantage, and this is obviously not fair.

On the other hand, if a pension plan were arranged so that both the employer and employee put in money in alternate years, and then put money in for two years—current contributions and the past year's contributions—they could then claim $4,000 in their RRSP the first year. Of course, they would be cut down a little bit in the second year, but even so, between the two years they would get $4,000 plus $2,500, plus another $2,500 worth of back service, which is $9,000, instead of an absolute maximum of $5,000.

These were the two sets of circumstances in which it was felt that taxpayers who were members of pension plans were getting more than they were supposed to be getting, and this provision cuts down the amounts that an employee can put into an RRSP in any year in which he is covered by an employer pension plan, in terms of which the employer will contribute for that year, either currently, in the next year, or at the end of employment. Everyone is now on the same basis.

The Chairman: Any questions?

Senator Lang: I do not understand it, Mr. Chairman.

Mr. Cohen: I am not surprised, senator.

Senator Laird: Give us some figures. Perhaps that is the best way to go about it.

The Chairman: I think that is a wise comment.

Mr. Cohen: Before Mr. Davidson gives you some figures, perhaps I might make a general statement about what the policy always was with regard to these things.

Senator Lang: I know the policy. You can start after that.

Mr. Cohen: All right. Then I will go back to Mr. Davidson and let him throw those figures at you.

Mr. D. L. H. Davidson, Director General, Tax Policy Division, Department of National Revenue: All right. Mr. A is employed for ten years. He is a member of a pension plan for all of those ten years. Nobody puts any money into the pension plan until the end of those ten years, but at the end of this period, when he retires, the employer puts in enough to give him a pension. It does not matter, I guess, what the employer puts in. Mr. A can therefore put $4,000 into his RRSP under the present law—a total of $40,000.

Senator Laird: You mean personally?

Mr. Davidson: Yes. Mr. B, on the other hand, is employed and also works for ten years. He is going to end up with the same pension, but his employer puts in a contribution every year throughout those ten years. Mr. B, however, is allowed to put only $2,500 into his RRSP. Therefore $25,000 will go into his RRSP every ten years, thus putting him $15,000 behind the other man. Yet each one of them has an identical pension, and this is not fair.

Mr. Cumyn: How would you compare the position of the employer in those two circumstances? Would he be getting the same deduction?

Mr. Davidson: Basically, he would be getting the same deduction, but of course, since he would be paying late, he would have to pay more money.

Mr. Cumyn: In the first instance he was only making a contribution in year ten. Would he be deducting his contribution in year ten?

Mr. Davidson: Yes.

Mr. Cumyn: In the second instance he was making contributions throughout the period. Would he be deducting throughout the period?

Mr. Davidson: Yes.

Mr. Cumyn: Would the one not conterbalance the other?

Mr. Cohen: Not at all. If you took a dcf calculation in the two situations, the employer in each is in the same set of circumstances, whether he pays annually, or whether he pays down the road. What he is funding, of course, is a pension, and whether he pays it annually, or funds it terminally, the cost is the same to him.

Mr. Cumyn: The cash flow is different, but the cost could be the same.

Mr. Cohen: The cash flow is different, but not the dcf cost, if you tried to find some basis for comparison. So the employer has an obligation to fund a pension plan either on the go or at the end of the term. The employee, however, as Mr. Davidson has pointed out, because of the peculiarity of the way the employer chooses to fund, has a different opportunity under the RSP, depending on the circumstances. In one case he has been able to contribute and deduct $25,000 only, and in the other he has been able to contribute and deduct $40,000. This clearly an inappropriate and unintended set of circumstances.

Senator Laird: I take it this is not aimed at the individual who is not employed, such as a professional man?

Mr. Cohen: No. If an individual is not a member of a pension plan, per se, this amendment does not affect him at all.

Senator Lang: The employer who pays equally, over the ten year period, is going to benefit the employee considerably more than an employer who puts in a lump sum at the end, with the money doubling itself at 10 per cent in ten years.

Mr. Cohen: Not really. What the employer is doing is funding some obligation at the end of the period, and how he funds it, really, in a sense, is a matter of choice for him, depending on the terms of the plan; but the calculations, if you take the value of money over time, should turn out to be equal. If I have to fund a $40,000 a year pension plan, I can either face an actuary at the end of the period and make a lump sum payment, or I can pay it on the go. Those two calculations are in balance. Be that as it may, what the employer does and how he chooses to conduct his business is really irrelevant to the situation of an individual contributing to a registered retirement savings plan. We are not talking about the individual's contributions to the pension plan, but his contributions to an entity unrelated altogether—his registered retirement savings plan.

Senator Lang: Thank you.

The Chairman: But there was an unintended advantage in sort of straddling the two plans.

Mr. Cohen: It certainly was unintended. It was always meant essentially so that people who were members of pension plans should only be able to contribute a maximum of $2,500 to a registered retirement savings plan. That was really the whole starting policy of the operation.

The Chairman: Any questions?

The next subject matter is the investment 5 per cent tax credit.

Mr. Thompson: Mr. Chairman, the investment tax credit is found in the latter parts of clause 9, starting on page 7 of the bill. You will recall that in the minister's budget speech last June, the government was quite concerned about the effect of the economic conditions on business capital investment, and also about the high financing costs that were faced. Consequently it was decided to do as much as possible, within revenue constraints, to encourage investment so that it would keep Canada competitive in an international sense, and also help ease the financial burden faced by capital intensive industry. This 5 per cent investment tax credit is the main measure which was introduced for this purpose. The exemption from withholding tax which is also in this bill was another measure that would clear the way for some extra long-term financing by Canadian corporations.

Senator Laird: On that point, could I ask what real advantage there is in view of the fact that, as I understand it, in most jurisdictions the 15 per cent withholding tax is deductible off local taxes anyway?

Mr. Thompson: Perhaps, senator, if you do not mind, we should leave that until we come to withholding tax clauses and I can deal with it then. The investment tax credit is 5 per cent of the cost of the asset, and the eligible assets are buildings and equipment used in mining and petroleum and other primary industries such as forestry, farming and fishing. Because it is an extra incentive introduced for the special circumstances that the country is in at the moment, it applies only for a temporary period, that is up until the end of 1977. The credit is claimed by the taxpayer as an offset against his tax otherwise payable. It can wipe out the first $15,000 of tax or one-half of the balance of his tax otherwise payable up to the allowable 5 per cent amount. There are certain other provisions for partnerships, trusts and co-operatives which are mainly technical provisions to ensure that the tax credit can be made use of in those organizations. I think that covers its main features.

The Chairman: He gets $15,000 deduction from tax and then he gets half of any extra tax that he may otherwise owe as a deduction from tax otherwise payable.

Mr. Thompson: Until he has absorbed the full 5 per cent credit.

Senator Connolly: You got a little flak on the other side in connection with storage facilities and warehousing and things like that, because apparently that was not taken into account. I did not see what the answer was to the objection. Was it simply a matter of policy?

Mr. Thompson: Well, senator, it is always hard to have a clear dividing line for a measure like this. The tax credit was aimed mainly at a productive facility; in the case of a manufacturer, it was aimed mainly at the factory, the plant and the machinery within it. On the other hand, it was not intended to apply to the distribution sector of the economy, or transportation or warehousing or that kind of thing.

Senator Connolly: Or management?

Mr. Thompson: Or management. The question, I think, stemmed from the idea or from the question as to how any company can be a manufacturing company without having a storage facility.

Senator Connolly: Or somebody to run the extra facility.

Mr. Thompson: The line drawn here for a building is in relation to its primary purpose. If its primary purpose is manufacturing, then a bit of storage is all right, but if you have to have a separate warehouse, then it becomes too much like a distribution function.

The Chairman: I suppose the answer is to build the warehouse as an adjunct to your plant.

Senator Connolly: Or build a plant a little bit bigger and just do not call it a warehouse.

Mr. Cumyn: Mr. Chairman, I have one or two points I should like to raise on the question of the tax credit. First of all, the provision which relates to co-operatives— subclause (6) at the bottom of page 7—permits a credit to be applied against the 15 per cent tax withheld from patronage dividends by co-operatives under subsection 135(3). The word "co-operatives" is explicity used although in section 125 it refers to dividends paid by any corporation. A co-operative is defined in section 136 which, it would seem to me, could give rise to a situation where you would have a corporation which was paying patronage dividends and which did not qualify as a co-operative. I was wondering whether it was intentional that this provision should not apply to such corporations.

Mr. Thompson: Yes, that was a conscious decision. It is mainly a matter of degree and the extent to which patronage dividends are paid. In the case of co-operatives, the problem we envisage in relation to investment tax credit is that the co-operative would distribute so much of its income as patronage dividends that it might not in itself have enough corporate tax to use up its investment tax credit. At the same time, it was much too cumbersome to think about passing the investment tax credit out amongst all the members of the co-operative. Hence the practical answer seemed to be to let the co-operative apply the investment tax credit against the withholding tax on the patronage dividends to the extent that it could not use it against its own corporate tax. Turning to corporations which are not co-operatives, we really do not think in a practical sense that such corporations would pay patronage dividends to that extent. In other words, they would have lots of their own corporate tax liability against which to use the investment tax credit.

Mr. Cumyn: May a co-operative choose, in effect, through the mechanism which is perhaps a little complicated, to apply the credit against its own tax in respect of non-members' business?

Mr. Thompson: The order of deduction provided in this bill is to apply it against its own corporate tax first, and then any balance goes against the withholding tax.

The Chairman: Mr. Thompson, a co-operative's income is made out of two sources: one from the members of the co-operative who do their shopping in it; secondly, from customers who are not members. The taxable income of the co-operative would be the profits from the sales to customers who are not members; is that correct?

Mr. Thompson: Certainly, that would be part of its taxable income.

The Chairman: It could, then, be investable income?

Mr. Thompson: It could be to the extent it is not distributed to the members as patronage dividends.

The Chairman: Patronage dividends subject to the 15 per cent?

Mr. Thompson: Yes.

The Chairman: Under this clause of the bill, if a co-operative has tax liability itself it may choose to use that 15 per cent, or whatever part of it it can, to reduce its own tax liability. That is its liability for tax arising in respect of its own income.

Mr. Thompson: It can use the 5 per cent tax credit.

The Chairman: Then the only one who is out is the one who receives the patronage dividend. Does he receive an amount less 15 per cent, in any event?

Mr. Thompson: It has no effect on the member who receives the patronage dividend. He will not know anything different has happened and will receive his dividend minus 15 per cent.

The Chairman: He will know that last year he got an amount of money as a patronage dividend, less 15 per cent.

Mr. Thompson: Yes.

The Chairman: Then, when this bill becomes law he will know that something has happened, because his dividend will seem to have increased.

Mr. Thompson: No.

The Chairman: The payment to him will always be less the 15 per cent?

Mr. Thompson: That is correct.

The Chairman: It is only the application of the person who has the right to use the 15 per cent; in certain circumstances the co-operative itself may use that.

Mr. Thompson: The co-operative may satisfy the requirement to pay the withholding tax by offsetting it with the investment tax credit. In other words, it is a way, if you like, of paying the investment tax credit to the co-operative. Instead of the co-operative sending in the withholding tax, it says it will cover it with its investment tax credit.

The Chairman: So the co-operative pays the patron his dividend, less the 15 per cent, then it takes the 15 per cent, if it qualifies, into its own funds?

Mr. Thompson: That is correct.

The Chairman: And the co-operative can spend it for any purpose?

Mr. Thompson: Yes; presumably it would have used it already for a new processing plant for processing honey, or something of that nature.

The Chairman: That is what you refer to as flowing through, is it?

Mr. Thompson: Well, it is a special kind of flow-through.

Mr. Cumyn: If I may continue, Mr. Chairman, on to the flow-through of the credit to partners in a partnership, or to beneficiaries of a trust. In the case of a partnership, there seems to be, to my mind in any event, a problem in that in paragraph (9)(e), on page 10 reference is made to "qualified property acquired by him—". That is to say, acquired by the taxpayer, and effectively it seems to me to be that in the case of a partnership which was entitled to a credit, and whose credit is passed on to the partners, there might be a problem in saying that the partner rather than the partnership had acquired the property and therefore there should be deductions from the cumulative credit.

Mr. Thompson: There may be, Mr. Chairman, something of a technical anomaly there, in the sense that, as Mr. Cumyn says, in this particular case the property was not acquired, really, by the taxpayer, but by the partnership. However, it clearly would run counter in its effect to the policy and the mechanics. I would therefore assume, even if it ever did become a matter of court proceedings, that the court would readily perceive that it did not make sense in its result.

The Chairman: I have two questions, Mr. Thompson. Mr. Davidson, you are the one who may have to interpret this in administration. Would your interpretation be in line with what Mr. Thompson has said? I asked you this question last year.

Mr. Davidson: That is correct, Mr. Chairman. The answer is that the Department of National Revenue would certainly try to give the interpretation as put forward by Mr. Thompson. However, I am sure that the Department of National Revenue would like to see more clarity in that respect.

The Chairman: As I understand it, the Department of National Revenue first seeks from the Department of Finance what their intention was in making this provision and here Mr. Thompson has told us the intent of the legislation. Therefore, in those circumstances I would expect the intent as expressed by him would be the interpretation that you would give.

Mr. Davidson: Mr. Chairman, I am sure we would try, but if you notice, a literal translation of this provision would aid the taxpayer and not too many taxpayers really like having a policy over-ride the law when it is not in their favour. We might have trouble in court.

Mr. Cumyn: Perhaps the clarifying amendment would be useful.

Mr. Davidson: I believe that the Department of National Revenue would certainly like to see that.

The Chairman: You know what the answer, then, is: It is the poor taxpayer who suffers, because if a judge, when you get to that stage, sets an interpretation which would not be the effect expressed by the Department of Finance, the poor taxpayer is stuck with the court decision.

Mr. Davidson: Would this be in his favour?

The Chairman: It would be in his favour in this case, but it could be against him.

Mr. Davidson: Yes.

Mr. Thompson: In this particular case the effect of a really literal technical reading could be that the partner would claim the tax credit on the same expenditure over, over and over again.

The Chairman: I think you had better explain that pretty carefully; all members of the committee would be interested!

Mr. Cumyn: You might, at the same time, consider the problem of the corporation which goes into an amalgamation. It cannot be considered, once amalgamation has taken place, to have acquired the property and this credit would be lost. Now, if the credit is a permanent feature on the tax scene, would it not be worth ensuring that the credit carries through on an amalgamation?

Mr. Thompson: It is a good point to raise, Mr. Chairman. At the moment, however, this tax credit is designed as a temporaty measure, so that some of those consequential aspects really are not dealt with thim time.

The Chairman: Do you feel that you could deal with it by regulation?

Mr. Thompson: No, Mr. Chairman: it is a matter for the law. However, in the interests of simplicity, we kept the provisions affecting this temporary measure to the minimum.

The Chairman: When you say it is a "temporary measure", is that because it only runs for a limited period of time?

Mr. Thompson: Until the end of 1977, yes Mr. Chairman.

The Chairman: Are there any questions?

Senator Laird: Mr. Davidson, are the interpretations set forth in the information bulletins put out by your department based on what you may feel is the policy set down by Finance?

Mr. Davidson: Yes, senator. Basically it is our interpretation of the law; but where the law is perhaps not clear and we know the policy of the Department of Finance is such and such, that is what goes into the bulletin.

Senator Laird: As the chairman points out, the courts might take a different view.

Mr. Davidson: Courts very often do, senator.

Senator Flynn: You do not insist for a decision that would run contrary to your interpretation?

Mr. Davidson: That is right, senator.

The Chairman: I do not think Mr. Davidson will go so far as to say that in those circumstances you would not make an assessment.

Mr. Davidson: Mr. Chairman, it is really the taxpayer who tries to get a break on this. It would then be up to us to attack him, knowing that the policy is different, on the grounds that the law would not make sense if it was read literally. It would then be up to the courts, in the event of a disagreement, to determine whether there was sense in the provision as it stood, and therefore the taxpayer was correct, or whether there was no sense in the law in the way the taxpayer hoped it worked, and therefore we would win.

Mr. Cumyn: Mr. Davidson, there is another problem here. I wonder how you would administer it. You might have a situation where the credit was claimed in a year in which there was no more depreciable property in the relevant class, with the result that the amount of the credit could not be appplied in reduction of the undepreciated capital cost of the property acquired. What would you do there? I should add that this credit is applied in reduction of the capital cost of the depreciable property that was acquired with the assistance of the creditor. If you pay $100 to buy a property and you get $5 credit, your capital cost for depreciation purposes is $95. If you get your credit too and you write off your property in year one, so that you have nothing more in your cost, what do you do?

Mr. Davidson: Nothing, Mr. Cumyn. There is nothing we can do.

The Chairman: You have had it!

Mr. Davidson: That is right.

Mr. Cumyn: The department has had it?

Mr. Davidson: That is right.

Senator Connolly: You cannot get it on any portion where you get a concession from the government, such as a grant of an allowance of some kind.

Mr. Cumyn: That is the point, senator. Let us say you get $5 reduction of tax credit in respect of an asset that costs you $100. Your asset is then considered to have cost you only $95. But there might be a timing problem whereby, in effect, your asset cost does not get reduced to $95. Mr. Davidson indicated that in that case the department has had it.

The Chairman: Mr. Thompson, to what extent would you say this tax credit is beneficial to the taxpayer?

Mr. Thompson: In simple terms Mr. Chairman, it effectively reduces the cost of his investment in equipment or buildings by 5 per cent.

The Chairman: It prevents him from taking as much depreciation in a subsequent year.

Mr. Thompson: Oh yes: but, in the same sense, if you put up a building for $95,000 instead of 100,000, you depreciate only the $95,000.

The Chairman: Quite true. He would have paid out only $95,000. If he paid $95,000, that is his base for calculating his cost.

Mr. Thompson: That is right; but in this case he has paid $100 and got $5 back from the government.

The Chairman: Calling this a tax credit will not become complicated by the fact that it might be suggested that this is a government grant or assistance? There is a provision in the bill.

Mr. Thompson: It is treated in the same way as a grant or other government assistance, in the sense that it reduces the depreciable cost.

The Chairman: Are there any further questions on this point? That was as far as I went with you on the list of things covered by this bill. There is the fact that the $750 of personal tax reduction now becomes at times $500. That is one that did not stay around for very long, when we were talking about examples of change—only this is changed by statute.

Senator Cook: That makes it better!

The Chairman: I do not think it is any more comforting, the fact that it is done by statute, because in doing it by statute I suppose they can make it retroactive to any time they wish. They may be able to move more quickly under a regulation, but ultimately by statute they can accomplish the same result. Is there anything else in this bill on which anyone wishes to comment?

Senator Connolly: I think Senator Laird's point was passed over.

Senator Flynn: The effect of the removal of the withholding tax.

Mr. Thompson: I believe the question was whether the removal of the withholding tax really helps a foreign lender, because why should he not be able to claim the 15 per cent withholding tax as a tax credit, anyway?

The answer is, I believe, that a number of foreign lenders are not, for one reason or other, in a position to receive the full tax credit. Perhaps they are borrowing themselves, so that their income is not the full amount of the interest that is coming from Canada but only s small proportion of it. So their corporate tax may not fully cover the withholding tax.

I believe life insurance companies sometimes find themselves in that position, because they do not pay corporate rates effectively enough to cover the 15 per cent withholding tax. Experience seems to indicate that this is so. It is hoped, and there is evidence already, that this provision will clear the way for more long-term borrowing than would otherwise take place.

Senator Macnaughton: Foreign lenders have been petitioning for this for years.

Senator Laird: So there must have been a reason for it.

Senator Flynn: You are saying that the tax payable by foreign lenders, in their countries, may be lower than 15 per cent?

Mr. Thompson: In effective terms.

Senator Flynn: So they cannot take advantage of this.

Mr. Cumyn: That is a common problem, senator. In the case of a German bank which may have to borrow money at 9½ and lend money to Canada at 10 per cent, its profit is half a point. Its tax in Germany is perhaps a quarter of a point, and yet the withholding tax is one and a half points. That represents an additional administrative cost.

Senator Connolly: Is there a cut-off date for this?

Mr. Thompson: Yes, there is. It runs to the end of 1978, which is also the termination date for the exemption of government debt.

Senator Connolly: What is the starting date?

Mr. Thompson: Bonds issued after budget day—after June 23.

Senator Connolly: What about modifications of a previous plan—for example, an extension of time? Let us say there is a foreign debt of $10,000 that carries the obligation to make a deduction at this time.

Mr. Thompson: Senator, it has to be an issue; so I do not think an extension of time on an existing issue would apply. It is conceivable, I suppose, that there could be a refunding in some cases. As long as there is a new issue, that would likely fall under the exemption provisions.

The Chairman: I suppose the same would apply to a retractable issue whereby in 1976, say, you have the right to elect to carry on to the full maturity of the loan, or you may take full payment of the loan at that time or, under some plans, should you elect to carry on to maturity you would get a higher interest rate.

Would you still look at that as being eligible for exemption?

Mr. Thompson: I would not have thought, Mr. Chairman, that there would be any new issue involved in those circumstances.

The Chairman: Well, it depends on how "new issue" is defined.

Mr. Thompson: The legislation simply uses the term "issue".

The Chairman: You could also have an amended plan. Would that be considered a new plan for purposes of the legislation?

Mr. Cohen: Mr. Chairman, there is obviously a range of possibilities with which we will be confronted. I suppose in policy terms the decision was not to attempt to define too narrowly what was and what wasn't, and the burden, I suppose, is going to fall on my colleague, Mr. Davidson, to interpret these things.

In policy terms, of course, what was sought was to encourage new money, and not merely to relieve the tax burden on money that had already been placed. Having said that, obviously there is a grey area where it is going to be very difficult to determine, and that is going to be a case-by-case examination.

The Chairman: I think it will be a question of a ruling in each case.

Mr. Cohen: That will very likely be the case, Mr. Chairman

The Chairman: Mr. Thompson, why do we keep talking about a 15 per cent withholding tax? What about the 25 per cent withholding tax?

Mr. Thompson: I suppose we keep talking about a 15 per cent rate because that is the rate that will apply with the tax-treaty countries, most of the sources of these funds being with tax-treaty countries.

The Chairman: Yes, but on January 1, 1976, to the extent that Canada does not have tax treaties, the rate becomes 25 per cent.

Mr. Thompson: That is correct.

The Chairman: I am just wondering whether you have found a different route for the negotiating and concluding of tax treaties. We used to get them in a bill that would come to Parliament.

Mr. Cohen: That is still the case, Mr. Chairman.

The Chairman: I have not seen many lately.

Mr. Cohen: There have not been too many bills of late. There has been good progress on treaty negotiations. We have initialled a good number and there are many more on the verge of being initialled. A few have been signed and, in due course, they will come to Parliament.

The Chairman: Avoiding a 25 per cent withholding tax, of course, is much more attractive than avoiding 15 per cent.

Mr. Cohen: That is quite right. In a sense, Mr. Chairman, the problem is to some extent relieved by this exemption for the next couple of years, in any event.

Senator Connolly: And it is only for new money. Existing borrowings that carry the obligation to deduct the 15 per cent withholding tax are still subject to the old rate?

Mr. Cohen: That is correct.

The Chairman: The parties can always terminate the loan and renegotiate.

Mr. Cohen: Yes.

Mr. Cumyn: I wonder if I might ask Mr. Cohen a question? Let us say that a treaty were to be entered into in June of next year, do you envisage, in the case where the 25 per cent rate had become applicable in respect of that country, some relieving measure whereby you would either make the treaty retroactive to the beginning of the year or grant an exemption by way of regulation from the additional 10 per cent?

Mr. Cohen: For that interim period?

Mr. Cumyn: Yes.

Mr. Cohen: Unless the treaty was retroactive, I doubt it.

Senator Laird: It would depend on the terms of the treaty.

Mr. Cohen: That is right.

Mr. Cumyn: The delaying of the 25 per cent rate until 1976 was, of course, predicated on the assumption that Canada would have negotiated a whole set of new treaties this year, which has not been the case.

Mr. Cohen: First of all, most of the lending comes already from countries with which we have treaties. Secondly, the exemption provisions are going to cover a large proportion of the balance.

Mr. Cumyn: I am thinking, as well, of dividends, rents, royalties, and other forms of payment attracting those terms.

Mr. Cohen: That is right, and in those instances the treaty situation will guide.

Mr. Cumyn: What about the interim period?

Mr. Cohen: It would depend on the terms of the particular treaties.

Mr. Cumyn: Will there be an effort made to make treaties effective as at January 1, 1976?

Mr. Cohen: Not really.

The Chairman: There are two points arising out of that, one of which is that it would be a government decision and, therefore, a policy decision.

Mr. Cohen: I agree with you, Mr. Chairman, but, to take it one step further, it would be the decision of two governments.

The Chairman: That is right. The second point relates to whether or not it is new money. If I make a deal in the middle of 1976, the agreement providing the effect retroactively, is that a new issue?

Mr. Cohen: That question is really dealt with by our own statute independent of any treaty, Mr. Chairman. Mr. Cumyn's question was really more broadly based in terms of a general treaty stance.

Senator Flynn: I note that this will be in effect until December, 1978, which coincides with the effect of Bill C-73.

Mr. Cohen: I had not thought of that.

Senator Flynn: Is there any relationship between the two?

The Chairman: Well, we will hear about that this afternoon. Is there anything further, Mr. Cumyn?

Mr. Cumyn: I just want to point out that there is a printing error on page 15 of the bill. The French text refers to subsection 277(5). That should read "227(5)."

Mr. Cohen: We will attempt to persuade the powers that be that it is a typographical error.

The Chairman: Well, one of the powers that be, if it should be subsection 227 and not 277, would be this committee. If it is treated as a typographical error, it would not require an amendment, but merely correction.

Are there any other points, Mr. Cumyn?

Mr. Cumyn: The amendments to the provisions permitting a deduction from taxes in respect of political contributions appear to extend the deductibility of these provisions to amounts contributed to a registered party outside of an election campaign. Is it envisaged that a federal party could in fact use these moneys in any way it felt fit, or would it have to use them for election purposes? I ask that question because the wording is slightly ambiguous. It is not clear whether the use in an election campaign applies only in relation to the candidate or both in relation to the candidate and the party.

Mr. Cohen: I think the answer to that question is "yes." I should make note that we cannot speak with a great deal of authority on these particular provisions. They were arrived at by all-party negotiation, and they are in the Income Tax Act because they happen to affect election credits. The policy behind this is really not a policy of the Minister of Finance.

The Chairman: But it becomes important for us to know whether the benefit of these provisions is limited to a federal election campaign or provincial campaigns.

Mr. Cohen: I am not denying the importance of the question. I am just trying to explain, Mr. Chairman, that we are a little hesitant in interpreting this provision, although I believe the answer is "yes."

Mr. Cumyn: The ambiguity will be found on page 6 of the bill, where the deduction is referred to as follows:

> . . . an amount contributed by the taxpayer in the year to a registered party or to a candidate at an election of a member or members to serve in the House of Commons . . .

The ambiguity is whether the words "to a registered party" are also qualified by the reference to the election, or whether the reference qualifies only the candidate.

Mr. Cohen: I think it is only the candidate.

Mr. Cumyn: You think it qualifies only the candidate? The qualification applies only to the candidate and not to the party?

Senator Flynn: I think the idea generally is that a contribution to a party for a candidate, whether at election time or otherwise, is admissible, and to a candidate or to the official agent of a candidate it is admissible only at election time. That would appear to me to be the logic of it.

Senator Connolly: As a matter of fact, there is no candidate until there is a nomination, and then he is a candidate until an election. Whether that is the night of the election or the date the official return is made I do not know. That is the only period of time in which there is a candidate.

Mr. Cumyn: That is correct. The only question then is whether the reference to a registered party is qualified by the words "at an election."

Senator McIlraith: I think the whole purpose of the usage of this term was to have it not qualified.

Mr. Cumyn: I think so.

Senator McIlraith: That is the whole point of it. Would it not be much better to have the words "to a registered party" at the end instead of before the reference to a candidate?

Mr. Cumyn: It would be logical.

Senator McIlraith: It would correct it beyond any doubt.

The Chairman: I think you are right as a matter of interpretation. It looks that way to me.

Senator McIlraith: There is room for argument about the interpretation. If the language is changed to put "to a candidate" first and then "or to a registered party" at the end of the sentence it would correct it.

Mr. Cohen: That would certainly make it clear.

Senator McIlraith: Why do we not seek to correct it now so that we do not make interpretation difficult?

Mr. Davidson: In National Revenue we split it into two things. It is "to a registered party" or "to a candidate at an election". The phrase "to a registered party at an election"

does not really make that much sense; I gather the parties continue all through the year.

Senator McIlraith: That is the point.

Senator Flynn: I do not know if it is the same wording as I see in clause 12 on page 14. I have no problem with the interpretation of:

> "Every registered agent of a registered party and the official agent of each candidate at an election."

A registered party cannot be a candidate at the election in any event. To me there is no problem at all.

Senator McIlraith: If it is in different places in the construction of the sentence it cannot be argued that it is related to "at an election".

Mr. Davidson: That is a good point. There should be a comma after "registered party". Unfortunately, the Department of Justice do not like commas!

Senator McIlraith: That is right, so when they fail to put in a comma we should change the location of the words or phrases in the sentence.

The Chairman: Or we could have "(a)" and "(b)".

Senator Macnaughton: The French version seems to be clearer.

Senator Flynn: You could not say "a registered agent of a registered party at an election".

Mr. Cumyn: It would be interesting to clarify the point.

Senator Flynn: I have no objection; I am trying to help you.

Senator Lang: We could insert a comma there. It is a typographical omission.

The Chairman: I think we have shaken that one for all its worth. There does not seem to be a non-favourable view to the wide interpretation. I believe Mr. Cumyn has one further question.

Mr. Cumyn: It is a general question. Apart from the concern in the practice, if you wish, that the FAPI regulations have not yet been finalized and we are living under the FAPI provisions now with draft regulations, which I understand are to be changed substantially, there is an additional and more specific concern.

There is an anomaly in the legislation as it now reads in section 94 of the act, whereby a discretionary trust would, if it is a non-resident trust which was caught by the FAPI provisions, be caught, not in 1976 as is everything else, but in 1972. I believe this is unintentional. It is an anomaly that has been raised from time to time. I wondered whether it would be possible to have clarification that this would be corrected in due course, because it is causing concern to a number of people.

Mr. Cohen: That point has been brought to our attention by others as well as yourself, Mr. Cumyn. It was unintended, and the final regulations will pick up that point.

The Chairman: Now the chairman has one question. Last year we had some meetings with Mr. Thompson's staff and our experts, and we went over various points that were concerning us about Bill C-49. When we were in committee all those points were raised with those who were here representing the departments concerned. In some cases there were explanations; in some cases there was agreement that what appeared in the bill did not express the intent. I recall that one had to do with a cross-reference. If you go back and look at the report of the meeting you will see that Mr. Thompson agreed that there should be a cross-reference in those clauses, otherwise it may make the situation of the taxpayer hit by it difficult. When are we going to move along? We get agreement on points and we do not get any amendments. When is that going to change?

Mr. Cohen: I cannot confirm to you when those points will be picked up. That is obviously a decision for the government to make. I can say that we certainly have those points noted, and I had not forgotten about them. I suppose it is fair to say that in the general budget the government decided to keep the bill as short as possible and not get involved in another technical round. In the interim those points were clearly agreed to, and I believe the Department of National Revenue is administering those sections as if the changes had been made so that no one will suffer. I can only say, I hope that for your sake, but not necessarily for ours, the next round will be a technical amending round to pick up some of these points. I am sure that is likely to be the case.

The Chairman: You could even have a bill dealing specifically with the technical points.

Mr. Cohen: That raises a number of problems. As you know better than I, the tradition has been to deal with tax amendments, big and small, as budgetary matters. That is the tradition, and I suppose that is the philosophy the government has been following.

The Chairman: Perish the thought that anything we would say or do should interfere with the philosophy of the government. Is that the theory?

Mr. Cohen: No, senator, not at all. The next time there is a tax amending bill dealing with technical points, I am sure the points you and others were considering, which you raised, will be redressed.

The Chairman: All I am doing at this moment is calling your attention to the fact that we have a long memory.

Mr. Cohen: Senator, I am well aware of that.

The Chairman: And we have it recorded in *Hansard*.

Mr. Cohen: I am well aware of that also.

The Chairman: There may be a limit to our patience. We do have the right to make amendments, or we can refuse to pass the bill.

Senator Macnaughton: You are putting a light in the window.

The Chairman: I do not know. A light in the window serves different purposes; sometimes it is a guide.

Mr. Cohen: We are counting on your patience, and we will address ourselves to these points.

The Chairman: The only other question is on FAPI. Time has run out. As at January 1, 1976 things that are covered by foreign accrual property income will start to operate, and that is not very far away. When we raised that question last year, and called your attention to it, the answer we got was:

> The representatives of the Department of Finance indicated that the matter was under study, and that it

was hoped that a further liberalization of these rules . . .

That is, the FAPI rules.

. . . might be achieved at some future date.

That is a most careful choice of words. If there is a commitment at any future date, when you get around to dealing with it, what happens to the taxpayer after January 1, 1976?

Mr. Cohen: The question of liberalizing the rules is one thing and, obviously, the commitment cannot dictate one way or the other. On the question of regime, whether too liberal or too strict, I take your point very well. As you know, there are draft regulations and we were hoping to be able to finalize and promulgate them before the end of this year. It now looks as if it will be early next year.

The reason for the delay, in large part, is that many of the companies most significantly affected by FAPI have asked us not to finalize the regulations until they have submitted their representations to us. They will not be able to submit their brief to us until the beginning of next year. So, in some respects, senators, it is at their request that we are holding up the finalization of these regulations.

The Chairman: To some extent, yes.

Senator Flynn: Mr. Chairman, speaking of clarifications and amending bills, et cetera, from a strictly technical viewpoint—I do not want to ask questions of policy of our witness—the so-called fiscal reforms which came into force in 1972 had two main purposes, one was simplification and the other was clarification. Would you say it has achieved either of these purposes, in substance?

Mr. Cohen: Senator, I do not know how to deal with that; it is a technical question.

Senator Lang: You have a problem.

Senator Flynn: The jungle is worse than it ever was.

The Chairman: I suppose Mr. Cohen might say that is a matter of interpretation too.

Senator Flynn: I suppose.

Senator Cook: I suppose you achieve simplification if you have fewer people in National Revenue.

The Chairman: With the anti-inflation bill, that might be a subject matter of discussion when we are at it this afternoon.

Now, we have dealt with the bill and I am ready to receive a motion. Shall I report the bill without amendment?

Hon. Senators: Agreed.

The Committee adjourned.

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FIRST SESSION—THIRTIETH PARLIAMENT
1974-75

THE SENATE OF CANADA

PROCEEDINGS OF THE

STANDING SENATE COMMITTEE ON

BANKING, TRADE AND COMMERCE

The Honourable SALTER A. HAYDEN, *Chairman*

Issue No. 64

TUESDAY, NOVEMBER 25, 1975

First Proceedings on:

"The *Subject-Matter* of Bill C-73, Anti-Inflation Act"

(Witnesses and Appendix—See Minutes of Proceedings)

29742—1

THE STANDING SENATE COMMITTEE ON BANKING, TRADE AND COMMERCE

The Honourable Salter A. Hayden, *Chairman*

The Honourable Senators:

Barrow	Hayden
Beaubien	Hays
Buckwold	Laird
Connolly (*Ottawa West*)	Lang
Cook	Macdonald (*Cape Breton*)
Desruisseaux	Macnaughton
Everett	McIlraith
*Flynn	Molson
Gélinas	*Perrault
Haig	Sullivan
	Walker—(19)

**Ex officio* members

(Quorum 5)

Order of Reference

Extract from the Minutes of Proceedings, November 18, 1975.

"The Honourable Senator Langlois moved, seconded by the Honourable Senator Perrault, P.C.:

That the Standing Senate Committee on Banking, Trade and Commerce be authorized to examine and report upon the subject-matter of the Bill C-73, intituled: "An Act to provide for the restraint of profit margins, prices, dividends and compensation in Canada", in advance of the said Bill coming before the Senate, or any matter relating thereto; and

That the Committee have power to engage the services of such counsel, staff and technical advisers as may be necessary for the purpose of the said examination.

After debate, and—
The question being put on the motion, it was—
Resolved in the affirmative."

Robert Fortier,
Clerk of the Senate.

Minutes of Proceedings

Tuesday, November 25, 1975
(83)

Pursuant to adjournment and notice the Standing Senate Committee on Banking, Trade and Commerce met this day at 2:30 p.m.

Subject: "The *Subject-Matter* of Bill C-73, Anti-Inflation Act".

Present: The Honourable Senators Hayden (*Chairman*), Connolly (*Ottawa West*), Cook, Desruisseaux, Haig, Laird, Lang, Macnaughton, McIlraith, Molson and Walker. (11)

Present, not of the Committee: The Honourable Senators Bell and Bourget. (2)

In Attendance: Messrs. R. J. Cowling, C. Albert Poissant and W. E. Goodlet, Consultants to the Committee.

The Committee proceeded to a detailed examination of the above Bill assisted therein by their consultants.

The charts used by Mr. Poissant in his explanation of certain sections of the Bill appear as Appendix "A".

At 4:25 p.m., the Committee adjourned until 9:30 a.m., November 26, 1975.

ATTEST:

Frank A. Jackson,
Clerk of the Committee.

The Standing Senate Committee on Banking Trade and Commerce

Evidence

Ottawa, Tuesday, November 25, 1975.

The Standing Senate Committee on Banking, Trade and Commerce met this day at 2.30 p.m. to consider the subject matter of Bill C-73, providing for the restraint of profit margins, prices, dividends and compensation in Canada.

Senator Salter A. Hayden (*Chairman*) in the Chair.

The Chairman: Honourable senators, this is our first hearing on the subject matter of the anti-inflation program and the bill to implement it, Bill C-73. We propose today to hear from certain witnesses, including Mr. Albert Poissant, who is well known to this committee and will develop in a wide range the subject matter. We also have Mr. Goodlet, who is assisting Mr. Poissant. Mr. Cowling is also well known to the committee and will be present in case questions are raised relating to the structure of the bill. So we are well armed to get some education, so as to be ready for the bill when it does arrive. Mr. Poissant, would you take over please?

Mr. C. A. Poissant, Special Adviser to the Committee: Mr. Chairman, honourable senators, first, may I say that we have prepared this documentation based on the material that was available to us. I heard just at noon today that there is now an amended bill, so the amendments are not reflected in the slides which I prepared last night and this morning. Secondly, also missing and not yet available are the regulations, which form an important part of this law. Therefore, it is with reservations that we are giving you this information as we understand it. Perhaps I should correct myself and say, "the way *I* understand it," so that if there are any errors they are mine. If there are questions, we will try to answer them, and either Mr. Goodlet or Mr. Cowling will be with me to assist you in understanding this legislation.

I have designed what I figured Bill C-73 would be. It is a type of dinosaur and all we know now is the law which, as you may see, is a very small part of it.

Senator Walker: It is the mouth.

Mr. Poissant: The regulations, which are not yet known, have behind them what I gather to be the guidelines, which we know about; but, again, they are only draft guidelines and, therefore, subject to amendment and modification. So whatever is said today may not be correct tomorrow, although we believe that the substance would not change that drastically. Bill C-73 is, according to the law, for a period from October 14, 1975, to December 31, 1978, and there are provisions for extending the law if necessary. It covers three important elements: prices and profit margins, compensation, and dividends. I repeat that the regulations are not yet available, although I understand part of them may be tabled in the House of Commons this afternoon.

It was provided, in Mr. Macdonald's speech, that the provinces should be requested to set programs for the following: rentals, professional fees, and provincial and municipal agencies. As honourable senators know, some provinces already have rental controls and control of professional fees. I know of one case which is under special regulation in the province of Quebec. I do not know about the other provinces; but it is certainly a provincial right, so far as we understand it. Therefore the federal government has asked the provinces to try to set programs to meet this special field.

To whom will the law apply? First, regarding prices and profit margins, it will apply first to entities of 500 employees or more. I will give you more details about that. It will apply to all construction industries which hire 20 or more employees. It will also apply to all suppliers of professional services. I have inserted here the word "all," because some nationwide firms or professions may be included where I have indicated an "a". If they have more than 500 employees, they are covered in "a". Items under "c" cover all single practitioners or small partnerships.

Mr. R. J. Cowling, Special Counsel to the Committee: May I interrupt you, Mr. Poissant, to point out that that is one of the areas in which there has been an amendment to the bill in the Commons committee. What you have shown as "c" now reads "suppliers of services prescribed by the regulations to be professional services." So some professions may be left out.

Mr. Poissant: We seem to be in the middle of a pingpong game here, depending on which side of the table you are. The amendment may not apply to all professions. I understand that briefs will be prepared or memoranda submitted to the minister on that subject.

It will apply to all federal departments and agencies of the federal government, with 500 employees or less.

It will apply, in what I have shown as "e", to firms whose employees take part in industry-wide bargaining. I took that from the guidelines. I do not know to which group it could apply, but apparently those involved in nationwide bargaining for wage increases will be caught by the act.

Interestingly enough, and indicated in my notes, is that the ruling of 500 employees will apply only to employees in Canada. If there is a branch or a subsidiary outside of Canada, it will not be taken in the group. If, on October 14, 1975, you had 500 employees or more—or if you are in the construction industry, 20 employees or more—even though you reduce that number later on, you will remain subject to the application of the law.

Where I have shown "b" new entities could qualify. Companies which have 400 employees may, by acquiring a subsidiary company or by opening a new branch, increase

the aggregate total of their employees up to 500 employees. They will be immediately caught by the act.

I have an additional note to the effect that all associated companies are grouped together in order to measure the size of the entity. In other words, not only must you look to the parent company, but you must also look to all the subsidiary companies. You must aggregate the total employees and if you have 500 employees or more you will come under the law.

If honourable senators have any questions as I proceed, please feel free to ask. I may not have all the answers, but I will try to provide them.

Senator Walker: That keeps them from subdividing things, from hiding things.

Mr. Poissant: That is very true. The definition of associated companies, by the way, has been borrowed from the Income Tax Act. The definition in that act is the one used in the application of this law.

Mr. Cowling: May I interject, Mr. Poissant? I refer to the references to section 256 of the Income Tax Act, where they talk about "controlled companies." They do not say directly or indirectly, and there are other sections in that act where they talk about "controlled companies" where they do use that phrase. However, it seems fairly clear from Bill C-73 that the intention is to go pretty far in so far as association is concerned, because they talk about interrelationship of management. I was a little surprised to see the reference to 256 rather than some of the other sections.

Mr. W. E. Goodlet: They have gone further than section 256 of the Income Tax Act. They contemplate wider associations as well as management and interlocking or financial control. I assume they will extend it there.

Mr. Poissant: There are compensation guidelines to apply to the same entity. I understand there is an amendment. That is now deleted from this slide. It was amended this morning.

Mr. Goodlet: That is correct.

Mr. Poissant: Prior to this morning, employees of a professional firm were not caught by the act; but now this has been amended and I have to delete it from this part of my notes.

Mr. Cowling: You do not need to delete it so much as make an addition. There is a new subparagraph "ii" that goes into subparagraph 3(2)(b). It says:

> Employees who are members of a profession of persons whose prices or profit margins are subject to restraint in accordance with the guidelines established pursuant to subparagraph (a)(3)

In other words, a salaried lawyer working in a law firm would be included under the guidelines. However, the secretaries and law clerks of the law firm would not be—subject to what Mr. Poissant said in the case of some large accounting firms which employ more than 500 people altogether

Mr. Poissant: Perhaps one solution would be for law firms to hire chartered accountants and chartered accountants to hire lawyers.

Dealing with dividends, with two exceptions, both of which will be provided in the guidelines, there is to be no increase over the previous year's payment of dividends. The first exception is when it is to facilitate new equity, new issue capital and, secondly, if the base year—which will be either 1974 or 1975, depending on the fiscal year of the company—was, as the guidelines put it, "abnormally low."

In other words, you could argue before the board that the dividends paid in the base year were either non-existent or so low that it would be unfair not to increase the payments of dividends.

One thing to keep in mind in this respect is that it is based on one year only. It is not an average of past payments or dividends.

Mr. Goodlet: I believe the minister announced subsequently, Mr. Poissant, that where you have established a quarterly dividend rate prior to October 14, you can go on the basis of four times the established quarterly rate, even though that rate is greater than the full dividend paid for the prior year.

Mr. Poissant: That would make sense, yes. There are a fair number of problems in the application of the proposed section on the payment of dividends. As you are aware, under the Income Tax Act there is a special provision for what they call small companies. In a nutshell, small companies, for purposes of the Income Tax Act, are companies whose profit accumulation is limited to a certain amount. In other words, if they exceed the allowable ceiling profit accumulation, they lose the low rate of income tax. In order to buy back that privilege, the law provides that such companies may make payments of dividends. If the proposed anti-inflation law then prohibits such companies from making payments of dividends, you have one act of Parliament contradicting another. On the one hand, the government provides an incentive through a low rate of income tax to remain small, and on the other it is saying that the payment of dividends will be against the law.

So, that is one area that will have to be settled, and Mr. Goodlet tells me that there are numerous problems surrounding the payment of dividends in the proposed law which have as yet not been cured.

Senator Bourget: What happens in the case of a company which has not paid dividends, say, for the two or three years prior to the coming into force of this legislation?

Mr. Poissant: It would depend on the circumstances. If, for example, a company established a pattern of paying dividends over the years and suddenly, as was the case with the paper industry, because of labour problems, the payment of dividends was stopped for one or two years, or perhaps because a company was going through a major capital improvement program, I should think such a company could get the permission of the board to pay the normal dividend based on the previously established pattern of dividend payments.

Mr. Goodlet: There has been a suggestion—and it is only a suggestion—on the questions and answers issued by the governmental officials working in this area that where there is no established dividend record—in other words, in a case where a company has never paid a dividend—a percentage of the previous year's profit, with the permission of the board, might be an appropriate limitation to put on the payment of dividends.

Mr. Poissant: What does the word "compensation" include? It seems to me, having read the draft guidelines,

that it will include salaries and wages. It will also include commissions, as well as any stock options provided to an employee. Any such stock option would be valued. Also included under "compensation" will be fringe benefits, bonuses, and directors' fees. All of these things will be included as the total compensation received by the employee, and I underline here that, as I read the guidelines, it has to be paid by the related group which, as has been said before, includes the interrelationship of management. That is under section 34 of the proposed act.

To take the example of a director of a company whose salary is $35,000 a year, that individual might get a director's fee from a subsidiary of that company, in which case both his salary and the director's fee would be taken into account in applying the new law. Even if one of the subsidiary companies of the parent were to contribute to a pension plan in his favour, that, too, would be taken into account in arriving at the total compensation received by that individual.

The wording of the guidelines is such that the right to raise commission rates is refused, and that applies even in the case of a company which wants to increase its volume of business. To take as an example an enterprise whose volume of business is on the decline and in order to attract more business the president or sales manager decides that there should be an additional rate of commission, the new law would prohibit such a step. The proposed law states that an increase in commission rates must be based on volume and that the rate itself cannot be raised. In other words, the earned commissions can be greater, but the rate of commission itself cannot be increased. Whether or not that will be amended, we do not know.

That being so, I would propose that there be provision whereby a company could obtain the permission of the board to increase rates of commission. The guidelines state that you cannot perpetuate a loss. In other words, if you are in a loss situation and the only way you can increase your sales volume to the point where you can at least break even is to raise the rate of commission, then I think you should be entitled to do so—but, again, subject to application to the board.

We have heard a lot about this compensation of $2,400 or 10 per cent. As you are aware, $2,400 is the magic figure. Again, the important words in this respect are "the maximum average in a group, $2,400 or 10 per cent," and again I use the 10 per cent figure liberally here. It could be 8 per cent or 9 per cent, but let us assume it is 10 per cent. This may vary, and it will vary according to the following circumstances: first of all, in respect of an individual in the same group. Let us say that the vice-presidents of a company, or the junior executive officers of a company, are all grouped together, giving you a total of 10 employees. You would then multiply $2,400 by 10, which gives you $24,000, and you can allocate that $24,000 any way you wish. In other words, one individual may get all of it or it may be divided in some fashion amongst all members of the group. That flexibility exists. That is one of the first exceptions to the general rule regarding the compensation of $2,400.

Next, it can vary in respect of a change in function. In other words, by promoting an employee, a company will be able to increase that employee's compensation.

Next, it can vary where overtime is involved. The guidelines, of course, say that the overtime must be of a "normal" nature. In other words, they do not want you to voluntarily create overtime and then create free time during other months.

(d) Increased production. For instance, for those working on a piecework basis, they will be entitled, if their production has been increased, to get more than an increase of $2,400.

(e) If there has been a greater workload and you have been asked to do something else, apart from your normal function in the past, this may justify an increase.

(f) Increase in volume of professional practice. For example, a doctor, a lawyer, who performs more work. It may not be easy to justify on an hourly basis but if he has had more clients, a greater volume will be expected and it will be permitted—not "permitted", these are not permissions to be granted, they are automatic. You get that if you can justify that you have a greater volume of production.

(g) To eliminate sex discrimination. In other words, a woman should have the same salary as a man and vice versa. If a man is occupying the function of a woman, this is to eliminate that discrimination and, again, you can give more than $2,400.

(h) To maintain long-standing historical relationship. This is very important in the application of the whole scheme. If the pattern of the company was to give a raise of $3,000 a year for the last 15 or 20 years, then I do not think the act means that you must reduce that to $2,400, if this is to maintain that long-standing historical pattern.

Finally, to obtain or keep an employee it may be necessary, even obligatory in order to keep a valuable man that you give him more than a $2,400 increase because he could obtain better treatment elsewhere. So, that everything being equal, it may justify obtaining more than $2,400.

There may be other matters but this is finally what I extracted from the guidelines. Are there any questions?

Senator Cook: What happens to an individual who belongs to three or four completely separate individual groups? Can he get $2,400 from each?

Mr. Poissant: No. The groups are to be taken as an entity, if you will. The only thing that I do not know at this stage is who is in what group. That may be difficult to define. There may be companies where "group" is easy to define, but let us say in an ordinary company, I would imagine, say, the office administration could be considered as a group.

Senator Cook: That was not my point. An individual might be a director; he might be practising law; he might even hold other offices. Is he limited to $2,400, or is each group limited to $2,400 that he belongs to?

Mr. Poissant: My answer to this would be "no." I think the act says "a group". Do not take that as being the final answer. However, from what I understand of the guidelines, that should not be taken into account.

Senator Connolly: On the last list, Mr. Poissant, which you had on the board a moment ago, it obvious to all of us that there are loopholes there and anyone who really wanted to set out to defeat the purpose could very easily take advantage of some of those loopholes. Is that not so?

Senator Bourget: Particularly the last one.

Mr. Poissant: Yes, I imagine so. It has been said publicly that if you merely changed the man's title he could obtain a higher increase. He used to be vice-president of administration and now you call him vice-president finance.

Senator Cook: Senior vice-president.

Senator Connolly: This involves a new write-up of duties, a new write-up of terms of reference and that kind of thing. It is going to depend a good deal, within those different categories, upon the bona fides of the people who are charged with administering the enterprise, is that not so?

Mr. Poissant: Yes. I guess a lot will be left with good behaviour.

Senator Connolly: It is a matter of the spirit of the law rather than the letter of the law, is that not right?

Mr. Poissant: That is very true. Of course, when you are talking of companies where there are 500 employees or more, usually they will want to obey and follow the spirit of the law, as you say, more than try to get around it.

There are, to my mind, a few loopholes, but maybe not truly loopholes, and it is just a matter of application of good administration in a company. How can you promote someone without giving him the normal compensation that goes with it? They will be faced with the other problem.—That is what I had to say about compensation.

Now, prices and profits, and the way they will be measured are in the guidelines—I would imagine that the regulations will contain additional information on this subject. The cost pass through formula should be the rule. If you cannot and you do not have the accounting method to measure that cost, then you will be allowed to use the per cent net margin, which is before tax. I am going to give you more detail on this right afterward.

The cost-pass-through formula must be applied when unit cost can or is established in a company. In other words, if you know how much it costs to manufacture a bottle, that unit cost has got to be used.

Now, I am going to call this the "ACB" or adjusted cost base because that is an important factor to know. I am going to use the ASB, or selling price, which is an important factor in the application of this law, and the adjusted price base. I am going to start with the adjusted selling price base.

Companies will have to use their price base as was known October 14, 1975. If they do not have that price, or that price is not relevant, they will have the right to select any selling price at any date in the previous 30 days.

Prices will not be changed more than once every three months. In other words, once you have established your selling price, by your adjusted price base, you will not be able to remodify it unless, again with rare circumstances, you could ask permission in an unusual case, to increase your price in the middle period. Prices are to remain constant for three months.

The adjusted cost price is a different point. Remember the selling price I said was the selling price as of October 14, 1975 or any price that you can pick up in the 30 days prior to October 14, 1975 for the selling price. The cost price is what it costs you to produce this unit. This will also be based on your costing account as of October 14, or alternatively could be based on the nearest accounting period, if it is a week, and that is the last available amount, the cost of production during the week, if this is the way you have dividend your accounting period in your operation; and if not, it could be your last month's cost price, or it could be the quarter or it could even be the year. Therefore, if on October 14 you did not have the cost price of the particular element, you may use the nearest accounting period that you have been using in the past.

Now, for new products, if there is a similar product, you have the right to use the highest price on the market. Let us say that I am manufacturing glasses and I never manufactured glasses in the past, then this is a new item, to me, then I am allowed to go on the market and find out what is the highest selling price of that product to my competitors and use it. If there are no similar products available on the market, you may set your selling price at any figure. In other words, you have the right to use a price for that unit that will be, comparatively speaking, the price you want to use because this is a brand new product never produced on the market before.

Senator Connolly: New to you.

Mr. Poissant: Not only new to me; if it is only new to me, then I should be able to compete with my competitors. If it is completely new in Canada, or there is nothing very similar, any price could be used. I suppose, again, that if it were too high a price, but no competition existed and there was no known price, it would be left to a person's good judgment to set the desired price.

The Chairman: If it is too high, the answer is very simple; you would not sell it.

Mr. Poissant: There is an automatic law there of "offer and demand." What does the word "price" include? It includes customs duty for imported goods; transportation charges when paid by the supplier; and when services such as installation are normally included in the price that must constitute the price of the goods. In other words, your supplier could not make you two invoices, one for the cost of the machinery, for instance, and an additional cost for installation or transportation when in the past they were all included in the price.

Senator Bourget: Is publicity also included?

Mr. Poissant: When there is an advertising promotion included in the cost of merchandise, I would think if this was a normal condition of the manufacturer it should be taken into account.

Mr. Goodlet: There is a provision for discretionary expenditures, which I believe includes advertising and might be subject to elimination under certain circumstances.

Mr. Poissant: But if I understood the question, it is not the advertising.

Senator Bourget: The promotion.

Mr. Poissant: It is the promotion. I know companies to which part of nation-wide promotion must be paid.

What does cost include? Cost may include estimates for the coming period. In other words, I am at November 25 and wish to prepare my cost and selling price and that is my three-month period starting, today. Let us say that under a union contract, wages are due for an increase on December 1, which is within the coming three-month period, I am allowed to take that into account in the October 14 base. It would be October 14, as I said before, or any date within the 30-day period prior to October 14, but to include as a right the estimates of any increase in costs which can be foreseen during the coming three months.

Increase costs will exclude the following: non-allowable expenses, such as capital losses; discretionary expenses, such a advertising and promotion. In other words, when the costing of the product is carried out it will include the basic factors such as material and labour. There there are usually variable expenses and overhead expenses in order to arrive at the net figure to be included in the cost of that product. Of course, there is no problem with respect to labour and material, the cost being passed on. However, when it comes to discretionary expenses it will not be permitted to pass along all of the extraordinary expenses. Another fact would be excessive compensation, let us say more salary were paid to the officers than is allowable; that figure must be deducted from the cost. It cannot be included in the cost formula and passed to the consumers.

Senator Desruisseaux: What is the position with respect to new products which are being introduced and are more difficult to sell and so on?

Mr. Poissant: If there are no similar products on the market . . .

Senator Desruisseaux: No; let us assume that there is a similar product, competing.

Mr. Poissant: Again, as the chairman said earlier, the price is usually fixed by normal law of demand and supply for new products. The only thing the guidelines say is that if there is a similar product the highest selling price on the market may be selected. That is to say, the highest selling price of competitors would be the selling price if it were a new product. If the product has been manufactured in the past, the manufacturer's own cost base must be utilized. However, if it is a new product and has not existed before, whatever figure is desired may be selected at the price. I gather that promotion and advertising could be included if it could be passed to the consumers, cost in excess of fair market value on non-arm's length transactions. In other words, the manufacturer is purchasing from a subsidiary at a price which is more than fair market value. This excess price which would be paid over the fair market value would be disallowed. For example, a manufacturer might be buying wood to produce furniture and that could come from one of its subsidiary companies, but the price paid is more than what would be paid on the normal market. The excess cost of that must be deducted and is not allowed to be passed on to the consumer. Of course, any extraordinary expenses, such as repairs and maintenance, may be looked at and perhaps disallowed. This is the cost-passed-through formula.

However, there is the other method to which I made reference earlier and which is part of the application of the law. There are the two methods and if costs can be identified it is allowed that they be passed to the consumer. If that cannot be done because, for instance, the accounting method does not permit it, there is the other formula, known as the per cent net margin, which is to be 95 per cent pre-tax formula. It will work as follows. The profit before tax for the previous five fiscal years must be weighted, taking any loss years into account. In other words, there may have been a loss in year one, in year two a profit, two more profit years, and loss in year five; these must be aggregated, including the loss years. But, here the disallowed expenses must be subtracted in arriving at the total cost of operation.

Let us say what are termed as discretionary expenses that will not be permitted to be taken into the cost after the implementation of the fact, October 14, 1975. These same expenses must be taken out in arriving at the cost for the previous years. The fourth point is that if the five-year average equals a loss, special permission will be granted. As I said before, the law is not to perpetuate losses and, if the aggregate of the five years arrives at a net loss, permission to increase the price over the cost-passed-through method will be granted because here there would be no 95 per cent margin. Anyway, 95 per cent of a loss is nothing. So it will be permissible to raise the price so as to realize a profit. Finally, the operations of a company can be split between the cost-passed-through method and the net margin method. In other words, if it is advantageous to split the operations into two sections and gain the benefit of both, that can be done if it is feasible.

The law says that the margin is to be applied on the last five years, except for retail and wholesale firms. Their base will be the last fiscal year. Therefore, for retailers, department stores, their basis is not the last five years, even though they use the 95 per cent method. They will only be entitled to use the last fiscal year as their base. Under "b" (on the chart), for companies which have been in operation for less than five years, the board could supply a net margin formula. The provision is for five years, but they may have been in operation for two years and have more than 500 employees. They can apply to the board and will be given the special formula.

The purpose of the act is to pass along to the consumer any reduction in cost. Let us say that the average profit for the last five years was $100,000. In the year 1975-76, which is the first year after the implementation of the law, you cannot have a profit of more than $95,000 before tax, because your average was $100,000. Its ceiling is $95,000. If it is more, it is presumed that you will reduce your price accordingly for the coming period or give it back to the consumer. There are major exceptions to this rule. It says that where there is an unusual productivity gain resulting from the efforts of the firm, this is an exception to the passing of the reduction to the consumer. You will be entitled to keep that additional profit within the firm. For example, you may be in the process of major capital expansion, which will reduce your unit cost of manufacturing. Secondly, there may be new technology in your company. If it is because of the efforts of the firm, that additional profit can remain with your company.

Senator Desruisseaux: How can you explain "unusual profit gain"? How can we find out what it is exactly?

Mr. Poissant: You may be starting a major expansion in machinery. Let us say that the cost of your production, because of old machinery, is $1 per piece, and, because of new, modern equipment, the cost per unit will be reduced to 80 cents per unit. You have changed your old mode of manufacturing because of your new machinery. That could be an "unusual" situation.

Everything being equal—having the same employees, the same machinery, the same premises—you have achieved a better per unit cost. That reduction of your cost should be passed to the consumer.

There could be an increase in employees, but the output per employee remains the same. There could be a gain because of new, modern techniques. If you make a saving on that, you keep that saving, even though it gives you more than 95 per cent of the previous 5-year average profit.

Senator Molson: What is the magic in the number "95 per cent?" How do we arrive at that number?

Mr. Poissant: Mr. Goodlet, you know the answer to that.

Mr. Goodlet: I am not sure that I do know the answer, but essentially I think that if we have a 10 per cent increase in prices, which is part of the objective, a 95 per cent profit margin applied to the 110 per cent price comes back to approximately the same dollar profit margin. It is just a mathematical exercise, I think, in relation to an assumed price raise.

Senator Molson: It might have been stated that no matter what you do your profit could not exceed what you are getting now.

Mr. Goodlet: Unless it is by increased volume. If you have a significant increase in volume, as opposed to unit prices.

The Chairman: On that point, I was looking at some figures recently. I will not mention the company or the board or commission. When they are settling budgets necessary for the next year's authorization, they assume immediately that the 10 per cent has been added, so the first thing they do is to deduct 10 per cent in attempting to arrive at a budget for the next year. So when you ask, "Where does the 10 per cent come from?" I suppose in some cases it is just a pipe dream, or they are importing knowledge which has no basis in fact. Perhaps "pipe dream" in a good definition of it.

Senator Lang: Mr. Poissant, in determining cost and price here, you are using interchangeably the words "unit" and "product". I am not sure how it is set out in the bill. Suppose I represent the Steel Company of Canada and you ask me what are our units and product. I could say that my product is steel and my units are rivets, girders and so on. Is my cost base based on the production of steel or on the cost of production of the various forms in which I sell that steel?

Mr. Poissant: In you case, where you do not have too many corresponding units, I would think the net margin pre-tax would be the formula you use. Steel companies make all sorts of pieces of metal. Some could be comparable, but it is not a continuous production. As an accountant, I would say the unit product is the product that you produce equally, in numerous quantities, in the processing or manufacturing—processing the same unit over and over again. When it comes down to per contract, it is difficult to arrive at the cost of an article or piece of steel. If you made so many items that it was not easily identifiable, I would go for the net margin profit.

Senator Lang: On steel as a product?

Mr. Poissant: On steel as a product. Being an accountant, I do not know that I can arrive at the cost of an article or unit. The act is after two major divisions: the process of many units of the same kind; and those that are not comparable elements. In the steel industry it is basically metal but not necessarily comparable units. We have to think of a product as being of a similar kind. Let us take Dominion Bridge. I do not think they would build two bridges of the same type. Although the structure in steel, I do not think it would be a comparable situation.

Senator Desruisseaux: There are some, such as the structure of certain houses. The Butler people make steel products that are really units which are repeated.

Mr. Poissant: If your cost is available, according to the guidelines you should use the cost unit in the case like that. Let us take your comparison, senator, for lumber in a saw mill, you know what your costs are in relation to labour and material for the production of two-by-fours, but where it involves the production of an odd sized cut, something that you do not normally produce, you then have to go to the net margin.

Senator Lang: What gave rise to my question, Mr. Poissant, was that the American legislation dealing with controls allowed a large manufacturing company, such as Stelco, for example, to have its cost base as a unit of steel production, regardless of the various forms in which it was produced. When the American program went into effect, Stelco went out of the business of nail production because its profit margin on nail production was not as good as it was on the production of 12-inch steel girders. It went out of the production of nails and carried that as an advantage in increasing its cost base on the production of steel girders. In other words, there were shortages created in certain types of products.

Mr. Poissant: In other words, it went to its most profitable product?

Senator Lang: Yes.

Mr. Poissant: That might be the effect of the program here in Canada, too. If the unit cost cannot be easily passed on, we could get into the situation where companies could decide to concentrate on the most profitable areas of production. Again, Canadian companies would be limited under the proposed law to either one of the two. Either you will be limited to your unit cost, passing along any new additional cost, or the 95 per cent margin limitation on your net profit. So, I do not think that Canadian companies under the proposed law could move to their most profitable areas of production.

A company could discard the unit cost as not being of use to it, but it would then be limited to the 95 per cent profit margin based on the previous five years. In that sense, there is some sort of barrier to that course of action in Canada.

The Chairman: Mr. Poissant, do you mean that this bill freezes types of production?

Mr. Goodlet: If I may respond to that, there is a suggestion in the guidelines to the effect that where a company drops the production of a loss product, it should not then be allowed to increase its profits. In other words, the pricing of the profitable operations of a company should be amended so that the same end profit would result had it continued with the loss sector of its operation. In other words, the abandonment of a loss operation should not allow a company to increase its profits. I think that is the suggestion as set out in the guidelines.

Mr. Poissant: In other words, if a company had one operation in a loss position and another in a profit position, with the average overall result of the preceding five years putting the company in a break-even position, the proposed law would not permit that company to discard the loss operation and then make 95 per cent of the net profit on the profitable side of the operation. In other words, that company would have to retain the base of the preceding five years which, in my example, was zero. Without the consent of the board, a company would not be able to drop the loss sector of its operation and then realize a 95 per cent profit margin on the profitable sector.

The Chairman: So, the legislation would freeze types of production.

Mr. Poissant: In other words, because the company is in a break-even situation, its losses equalling its profits, that company could not raise its prices on the profitable portion of its operation without the consent of the board.

Senator Connolly: But it could eliminate its loss operation?

Mr. Poissant: It could eliminate the loss operation, but by so doing it would lose; it would not gain by it. It would be nice to be able to jack up your average by getting rid of the loss operation and then taking your margin of profit on the profitable operation for the preceding five years and paralleling it for the coming year, but the legislation will not permit you to do that. The loss operation must be taken into account in arriving at your base.

Senator Cook: A great deal of this is going to be *ex post facto*. What will happen if a company turns out to make a profit without having asked permission? In other words, what if a company, in the ordinary course of conducting its business, realizes a profit exceeding the allowable limit?

Mr. Poissant: You mean in excess of the 95 per cent margin?

Senator Cook: Yes.

Mr. Poissant: Two things would happen. First of all, the company must pass along a reduction in price to its customers; it must reduce its selling price.

Senator Cook: You are saying that the selling price would be reduced in the future?

Mr. Poissant: In the future, yes. I imagine this will be dealt with at the end of the first fiscal period of the company after the law goes into effect. If a company realized a profit of $110,000 and was entitled only to a profit of $95,000, then the $15,000 must be applied against the reduction of costs for the next fiscal period.

Another possible alternative is that the excess profits could be used in respect of estimated increased costs in the future. That being done, the company would then not have to pass on a reduction in price to its customers. Instead, it would set aside the excess profit as a reserve fund for future cost increases, provided the company can justify such estimated cost increases.

Senator Cook: The company would set aside the full amount?

Mr. Poissant: Yes, but do not take that as being the gospel. I am just putting that forward as one method that I think could be used. The law permits a company, in arriving at the establishment of its costs, to take into account future increased cost estimates. That being so, if on October 15, 1976 I have realized $25,000 more in profit than my base period allows, it is my opinion that the excess profit of $25,000 could be justified to the board as being the amount needed to cover future increased costs. As I said earlier, I do not take that as the gospel. The board could take the position that the full $25,000 must be returned to the company's customers through a price reduction.

Then, we are coming to what happens when you have excess revenue.

Senator Bourget: Could you invoke, in the circumstances, the exception of unusual productivity?

Mr. Poissant: Yes, of course. Again, you have to establish that you are entitled. The only exception permitted is unusual productivity gains resulting from the efforts of the firm. If you can justify that, that is one of the exceptions that permits you to keep your additional profit.

The Chairman: Mr. Poissant, then it appears you may be in this position: on profitable items, your profits keep increasing; and on loss items, you keep incurring losses. In the ordinary operation of business you abandon the loss items. Will this bill permit you to abandon the loss items, or must you carry back the extra profit to make up for the losses on the loss items?

Mr. Poissant: My answer to this, Mr. Chairman, is that the bill does not prohibit you from stopping a loss item. You can stop production of a loss sector any time you want.

The Chairman: Then there would be no application of carry back.

Mr. Poissant: No.

Senator Molson: Mr. Chairman, may I return to this question of having to return any excess profit to the customer? In fact, this simply cannot be done. It is always found out later.

You may remember that during the Roosevelt era in the United States they put in WPA—I have forgotten what it was. Then, at a later stage, they analyzed all the costs and so on. I happened to know a man called Elliot White Springs, who had a very big cotton mill. He sold millions of yards of material over the years to shirt manufacturers. All of a sudden, about three years later, it was thought that the shirts were sold at 50 cents too high a price. The person who sold them had to return that money. They came back to the Springs cotton mill and said, "You have too much money," and so on. No one knew who bought the shirts. There was simply no way of tracing such things. So, being the humourist he was, Elliot White Springs disappeared to Bermuda.

Mr. Cowling: In this bill, senator, Her Majesty will get the benefit of the excess.

Mr. Poissant: I am coming to that, Senator Molson. It is part of the notes that I will discuss later.

I just want to state that this law will be applicable to insurance premiums—life, automobile, fire and other types of insurance premiums; they will be subject to the guidelines. If they want to raise their premiums, they will have to justify the fact that their cost of operations and claims has increased.

Senator Walker: They will not have any problem then with insurance companies.

Mr. Poissant: Not for a little while, perhaps, not in the forthcoming year.

Senator Macnaughton: $325 million.

Mr. Poissant: I have prepared a list of items that do not come under the application of the law; the first, farm and fish products at the producer level. Processors and distributors will be subject to the guidelines.

There will be no limit on the cost of constructing a new building for the first five years. I use the word "building" here, and I think the intention was for the housing program. I am not sure if it will apply exclusively to houses.

The next item is compensation received outside the country. This is not in the guidelines. It is by deduction that I arrive at this conclusion, because the bill is only applicable to Canadians. If you were to get a director's fee from New York, or any compensation from outside Canada, this would not come under the application of this law.

The Chairman: It might come under the income tax law.

Mr. Poissant: It would be taxable, that's for sure. The price of land does not come under the application of the law. Also, bonds, stocks and commodity futures are not within the application.

Senator Walker: Why not?

Mr. Cowling: There is a special exemption in the definition section of the bill.

Senator Walker: I appreciate that.

Mr. Cowling: What the principle is, I do not know.

Mr. Poissant: The question is, "Why not?"

Senator Connolly: Could I go back, for a moment, Mr. Chairman, to item (c)?

The Chairman: Yes.

Senator Connolly: That item deals with compensation received from outside the country. What about the case of foreigners resident in Canada and working for a foreign resident company, and paid from head office abroad, are they not subject to the guidelines?

Mr. Poissant: My answer to that would be "No", Senator Connolly.

Senator Connolly: Even though resident in Canada themselves?

Mr. Poissant: They do not have to be a resident, but the law applies to the payer, and the payer must be a Canadian because it says that it applies to Canada only. If, as in your example, he is being paid by a foreign company, then he is not subject to the application of the law. There is more than that. Remember also that we are talking of 500 employees or more.

Senator Connolly: Yes.

Mr. Poissant: These employees are only Canadian employees.

Senator Cook: The law applies at the source of everything.

Mr. Poissant: If we use the income tax definition, yes, it would be at the source.

Senator Lang: What about compensation regarding corporate earnings earned abroad?

Mr. Poissant: This would be excluded by definition, because the payer is not here. Would my colleagues agree with me on this, that foreign dividends would not be subject to the application of this law?

Mr. Cowling: Dividends paid by a foreign corporation—yes, I think I would agree with that.

Senator Lang: It was thinking of a Canadian corporation and earnings from sales abroad. Is that brought into it?

Mr. Poissant: By "earnings", do you mean any type of income?

Senator Lang: Yes.

Mr. Poissant: When you are talking of export, and because of earnings from exportation would that be right?

Senator Lang: Yes.

Mr. Poissant: They are going to apply a special levy on excess revenue due to exportation, which has not been explained yet. There is going to be a modification of this special levy. We have nothing to offer at this stage to answer that question.

In other words, on the export field they will have what they call a special levy. So, in this case, if I get your question properly, this company would have foreign income because it has exported merchandise. We do not know how it will operate, although in the guidelines there is some indication that on the export market you may have to meet the international prices, and so that will be allowed. If you have international prices and domestic prices, then the formula is a little more complicated.

Senator Connolly: If they are linked, yes.

Mr. Poissant: This will not apply to personal property, which includes used cars, homes, furniture, paintings and collectors' items. In other words, they do not come under the law at all. You can sell your home without having to look at a corresponding house in the neighbourhood. Even if you had an identical property, you can sell your home at any price you wish.

Pension income does not come into account either, except that if you are to make any changes in the pension plan of your company, you will have to ask permission. There is an example in the guidelines with respect to pension income, where it says I am to receive normally a $40,000 a year pension from my company and because of the indexation factor I am entitled to have a 10 per cent increase which will give me an additional pension of $4,000 this year.

The answer is, no problem if it is part of the pension that provides for indexation, $40,000, plus an index factor say of 10 per cent. That $4,000 is greater than the limit of the $2,400 to which we made reference earlier, but it is permissible.

Senator Walker: Item (e), "bonds"; I suppose the capital gains tax already provides for a tax on that. These are excluded, are they not?

Mr. Poissant: Yes, and why is there mention of their exclusion? I question that myself. Let us say, why would Bell Telephone shares be excluded? I don't even see the need for such a mention. It goes without saying that shares (especially those on the market) are freely negotiable. I do not understand why there should be a freeze on the price and the sale of shares. Let us consider that we are discussing an initial issue. Now, again, there is no corresponding figure or cost in the past. They are not contained in the law

as an exclusion but are in the guidelines, maybe to tell us we do not have to worry about those.

Senator Cook: It does not matter how high a bond goes; it has nothing to do with the cost of living. You do not have to buy it.

Senator Walker: That would be it.

Mr. Poissant: It is not contained in the law; it is just a guideline that says not to worry about those matters.

Senator Connolly: We will, I take it, Mr. Chairman, have an opportunity to discuss the binding effect of the law, and to what extent, by contrast, the guidelines and regulations will have binding effect. We can discuss that, I take it, when we receive the bill. Is that the plan?

The Chairman: Well, we might discuss them even earlier. However, the question is, what approach do we make to this type of bill? Is its value such, its need such, that we ask ourselves is it workable, rather than is it valid? If it is needed, surely the last question, in my opinion, would be "Is it valid?"; or if we have the co-operation of the provinces and the federal authority so that what one lacks the other will make up. The bill contains provisions which seem to provide for agreements between the federal authority and each of the provinces, which must be intended to deal with that area. So the question is whether, in those circumstances, we put validity as number one, or put it down at the end of the line. My feeling at the moment is that maybe it does not belong at the top of the line. However, my mind is open at the moment.

Senator Walker: Let us finish this presentation.

Senator Connolly: Yes.

Mr. Poissant: We were discussing earlier the excess revenue. That is under the law itself, rather than being contained in the guidelines. There might be one modification which Mr. Goodlet or Mr. Cowling may wish to correct. What will happen if you receive more than 5 per cent of your profit; if your unit selling price were higher than permissible, or compensation greater than what should have been received? Here is the mechanics of the law, which is contained in clause 22 of the bill.

Mr. Cowling: It is page 20 of the bill, honourable senators.

Mr. Poissant: You do not need to read it; I can condense it for you. Are there any amendments, Mr. Cowling?

Mr. Cowling: No, there are no amendments.

Mr. Poissant: This is how it will work. If the administrator discovers that the law has been contravened by charging more than just passing the additional cost on to consumers, or that more than 95 per cent of the base profit has been realized, he may (a) prohibit continuation of this contravention—in other words, he may order that the increase be stopped or that the price be readjusted to what it should be. (b), he may order, that the excessive revenue be returned to the customers and only, of course, if these customers can be identified, which takes us back to Senator Molson's earlier query. For instance, shirts might be sold to a large number of customers. How can it be said which of them is to receive the benefit of the price reduction. So, if (a) and (b) are not met, (c) the administrator may and probably will order a rebate to all customers of an amount which the administrator may determine. In other words, $25,000 more profit than allowable may have been received. It may not be possible to identify which particular customers should receive a rebate, so the administrator may just order that the price be reduced, generally speaking, so that $25,000 is immediately given to the customers. If that were not ordered and it could be that there were one particular situation in which the difference cannot be rebated to the customers, the administrator may require that this excess be remitted to the government. This I consider to be a hundred per cent penalty. In other words, that $25,000, if it does not fall under (b) and (c), the administrator may order it to be returned in full or in part to the government.

What happens now with compensation in excess of what was discussed earlier, such as 10 per cent or $2,400, or dividends in excess of the entitlement to pay has been paid? It will work approximately in this manner. The administrator may first order that this payment which is not allowable cease. He may say, "You have passed a red light, but we will just give you a warning ticket." However, he may also require the payment to be remitted in total to the government, or that such payment be withheld from similar future payments (compensation or dividends). In other words, dividends have been paid to foreigners, or anyone, in excess of what was allowable, so future payments, if it can be done must reflect an adjustment. Or say the salary of the vice-president was overpaid according to the formula, say by an amount of $10,000. The next year's payment must be reduced by that $10,000. If this is not done, the total amount goes to the government as being a hundred per cent penalty. It is more difficult here; when we are talking about excess revenue the cash is available. However, in this case the money has been given out and it may not be possible to deduct it from future payments, so a very heavy fine would be imposed in this case by having to give the equivalent amount of money to the government to match the excess part, or up to the maximum of the excess. So this is very, very strong.

Finally, if the recipient has received excess money, there is a dual responsibility: First, the payer of the compensation is responsible in this manner, but the recipient may also be responsible. However, this would be only under one circumstance; where the recipient knew or reasonably ought to have known that the guidelines where contravered. I have put a question mark here. How would he know that the compensation or dividend he received was in excess of the permissible amount? How would he know that he was receiving excess compensaion or dividend? This may pose a serious question. There is dual responsibility here. The fine will not apply to both. If there is a request under the payer, the recipient will not be request to refund the excess; but if the payer is not fined, the administrator may say, "First refund the money to the company or we will charge you." That is what is important here.

There is a penalty when you have knowingly contravened the application of the reserve, the compensation or dividend—if you have knowingly contravened the three points, there is a 25 per cent penalty to be applied to the excess.

Let us go back to the case of a company which has paid excess dividends over the year. The administrator may say, "Reduce it from your future payments," or, "Do not reduce it but pay an equivalent amount to the government." On top of that, there may be a 25 per cent penalty for having done so. So it may go up to a penalty of 125 per cent in

some cases. Again, the penalty is not necessarily applied on the total excess. It can apply to parts of it. In any case, the administrator has the right to apply a penalty over and above the excess compensation . . .

Senator Walker: Up to 25 per cent.

Mr. Poissant: On the excess.

Senator Cook: Does this apply to all companies or just to those which have 500 employees or more?

Mr. Poissant: Only to those which are subject to the law—those companies with 500 employees or more. Except dividends: dividends are not limited to companies with 500 employees; they apply to any company.

Senator Cook: We can see where a sole owner would know that he is breaching the guidelines.

Mr. Poissant: Let us say a shareholder owns only 5 per cent of that company. There could be a serious problem. If you are a sole owner, you would know that you paid yourself excess dividends. That is really what the act is after

Mr. Goodlet: I think it is not quite clear what is the intention of the dividend application. The law at present says that it can apply to dividends of any corporation; but there is some indication that when the unknown rules and guidelines come down, it may have less application than to all corporations. Again, to take care of some of the situations we have discussed, where it is required to pay greater dividends in order to conform to the requirements of the Income Tax Act, it may be that there will be an easier application of dividends under the law.

Senator Cook: Broadly speaking, there is no limit applied to dividends.

Mr. Goodlet: Broadly speaking, it applies to everyone.

Mr. Cowling: It may apply to "a particular class of suppliers, persons, employees for dividends, specified in or in relation to the guidelines." That is a new subsection 3.1 which has been included in the bill as an addition to section 3, on page 5 of the bill.

Senator Connolly: What about a regulated industry—for example, industries which have to have their rates set, like the Canadian Transport Commission, Bell, or perhaps Hydro—organizations which sell commodities and services of the kind that are regulated either federally or provincially? Will those applications proceed in the normal way—not at the discretion of the management of the companies—for the sale of their products?

Mr. Poissant: Those that are already legislated, such as transportation, radio and television broadcasting corporations, which have to have rates fixed, are invited to be part of the intention of the law.

Mr. Cowling: There is a direction to them in section 4.1 on page 8 of the bill. It is quite a lengthy section. The suggestion is that the guidelines be followed, but that perhaps they need not be followed.

Senator Connolly: It is not a matter of discretion with them as to what their rate should be; they have to justify it before they get the rate set.

The Chairman: Even in justifying it, do they have to observe the ceiling?

Senator Connolly: That is it.

Mr. Poissant: Mr. Chairman, I would ask Mr. Cowling to go over the appeal section. If you are dissatisfied with the administrator's decision, you may appeal against that decision. If you were required to give back the excess to your customers, to return money to the government, or if you received excess compensation or dividends and you have to pay the penalty of 25 per cent under an order issued under sections 20 or 21, you may appeal to the Anti-Inflation Appeal Tribunal of the board to be instituted.

You have to deposit the amount of the excess, or give sufficient guarantee to the Receiver General. You will then have the right to an appeal. The appeal must be lodged within 60 days of the order, under section 31 of the act. I will not go further on this, because amendments were made today. Mr. Cowling, would you like to explain the appeal situation and the Cabinet's rights which have been changed today?

Mr. Cowling: Mr. Chairman, I would like to stress a few points about the scheme of the legislation. As Mr. Poissant has said, the real guts of the thing is in the regulations: bill C-73 merely contains the machinery; the interesting part is in the regulations.

Senator Connolly: Which we have not seen.

Mr. Cowling: No one has seen the regulations. It is all speculation, based on the preliminary guidelines tabled by the minister on October 14. The bill provides for three bodies: first, the Anti-Inflation Board; Second, someone called the Administrator; and third, the Anti-Inflation Appeal Tribunal. They are all quite separate and distinct.

The board does not make any quasi-judicial or quasi-legislative decisions, so far as I can see; it is an investigatory kind of body. The administrator can make orders, and it is the breach of those orders which is punishable under the act. In other words, there are no *per se* offences. If you breach the guidelines, the accused does not find himself directly in the courts. First, the administrator has to find that he breached the guidelines and make an order against him, either to stop him doing something, or a roll-back type of order of the kind that Mr. Poissant was discussing. Then the third body, the Anti-Inflation Appeal Tribunal—and the members of that tribunal are not the same people as are the members of the board—is really an appellate court; it hears appeals from orders made by the administrator.

Senator Walker: Can anyone appeal, regardless of the amount?

Mr. Cowling: I do not believe there is any ceiling.

Senator Walker: And there are 60 days in which to appeal?

Mr. Poissant: Only, yes.

Senator Macnaughton: Is it "only" or "may".

Mr. Poissant: Sixty days is the maximum.

Mr. Cowling: There is a 60-day period provided in which to appeal.

Senator Macnaughton: Yes, and after the expiration of 60 days, no appeal can be launched.

Mr. Cowling: The Appeal Tribunal has full power to make a brand new decision. In other words, it is a trial *de novo*, so to speak, before the Appeal Tribunal.

The Chairman: Notwithstanding the investigatory process by the board and the order by the administrator, there is a trial *de novo* before the Appeal Tribunal, which means that all the evidence is presented anew and any additional evidence that has any relevancy may be presented. It amounts to a trial.

Senator Walker: Three cracks at the kitty.

Mr. Cowling: There is then an appeal from the decision of the Appeal Tribunal to the Federal Court of Canada, and that is under section 28 of the Federal Court Act.

Senator Connolly: And that, again, is a trial *de novo*?

Mr. Cowling: No, it is not a trial *de novo,* Senator Connolly.

Senator Connolly: It is not to the Appeal Division of the Federal Court?

Mr. Cowling: Yes, it is to the Appeal Division under section 28 of the Federal Court Act.

The Chairman: It seems we either suffer from an overload of rights of appeal or, as we sometimes find, the lack of any desire to provide any right of appeal. On occasion we are presented with both situations in two pieces of legislation at the same time.

Senator Walker: Mr. Chairman, these are appeals from facts; there is not much law involved. To me, it seems ridiculous that an individual or company should have three cracks at the kitty—first to the administrator; then to the Appeal Tribunal, and then an appeal from the tribunal to the Federal Court of Appeal. That seems ridiculous when only questions of fact are involved.

The Chairman: I think we should have a jury.

Senator Walker: We do not need a jury.

Senator McIlraith: There will be a jury on this, a very large one.

The Chairman: There is no doubt about that.

Senator Walker: A very cumbersome bureaucracy will be built up.

The Chairman: What you mean, Senator Walker, is that is hard to justify so many appeals where the issue is an issue of fact.

Senator Walker: Exactly, and it cannot be anything but an issue of fact.

Senator Cook: The Appeal Tribunal will be a creature of the act, will it not?

Senator Walker: Yes, exactly.

Mr. Cowling: Except, of course, that the regulations, when they come out, undoubtedly will be very detailed. We expect that, and I suppose the regulations will be the law. There may be "nice" questions as to whether given factual situations do or do not fit within these complex regulations, and the Appeal Tribunal will be a specialized body, of course, familiar with the kinds of situations that are likely to crop up in this area.

Senator Walker: But these are strenuous times and this is an emergency measure, in one way. It seems to me that to give all that time is overdoing it.

The Chairman: Of course, there are some of us who can go back to the Wartime Prices and Trade Board and the Foreign Exchange Control Board, both of which were certainly systems of trial and error. Both boards worked reasonably well. They passed regulations and orders and one could challenge the order, although many of the offences were prohibitive offences, so one was really without a defence. When they found that an order was not the proper one, they simply passed another order.

Depending on the circumstances that you are dealing with, you have to cut the cloth to fit the case. If you have an emergency situation, then possibly you wear different glasses.

Senator McIlraith: There is a difference here that is rather worrisome, Mr. Chairman. In the controls and regulations at that time, there was quick finality of decision, whereas under this procedure there is the possibility of a delay, it seems, through the appeal procedure, so great as to render the legislation virtually useless.

The Chairman: The only deterrent to exhausting all appeal procedures would be the costs.

Senator Walker: And the time involved.

Senator Cook: Yes, and, in addition, the money has to be put up.

The Chairman: Yes, the security or money has to be put up.

Mr. Goodlet: Also, if the administrator has ordered a rollback, the rollback has to be followed until such time as the appeal is heard, so it is effective from the date of the administrator's decision.

Senator McIlraith: That may be the effective answer to my concern.

The Chairman: Before adjourning, I want to thank Mr. Poissant for his excellent presentation this afternoon.

Senator Walker: He has done very well.

Hon. Senators: Hear, hear.

The Chairman: Hopefully, Mr. Poissant will be able to be here on Thursday morning when we next deal with the subject-matter of Bill C-73.

The committee adjourned.

NOTES PREPARED AS AT NOVEMBER 20, 1975

BILL C-73

OCTOBER 14-1975 to DECEMBER 31-1978

PRICES (PROFIT MARGINS)

COMPENSATION

DIVIDENDS

<u>REGULATIONS NOT AVAILABLE YET</u>

PROVINCES ARE REQUESTED TO SET PROGRAMS FOR:

RENTALS,

PROFESSIONAL FEES, AND

PROVINCIAL AND MUNICIPAL AGENCIES

<u>PRICES AND PROFIT MARGINS OF</u>

a) ENTITIES OF 500 EMPLOYEES OR MORE

b) CONSTRUCTION INDUSTRY 20 EMPLOYEES OR MORE

c) SUPPLIERS OF PROFESSIONAL SERVICES (all)

d) FEDERAL DEPARTMENTS AND AGENCIES

e) FIRMS WHOSE EMPLOYEES TAKE PART IN
INDUSTRY-WIDE BARGAINING

<u>ALL OF THE ABOVE IN CANADA ONLY</u>

NOTE: (a) ENTITIES QUALIFYING ON OCT 14-75
CONTINUE TO BE REGULATED BY THE ACT

(b) NEW ENTITY QUALIFYING AFTER OCT 14-75

(c) ALL ASSOCIATED COMPANIES ARE GROUPED
TO MEASURE THE SIZE

DIVIDENDS

NO INCREASE OVER PREVIOUS YEAR EXCEPT:

(1) TO FACILITATE NEW EQUITY CAPITAL

(2) BASE YEAR WAS ABNORMALLY LOW

PROBLEMS

SMALL COMPANY DEDUCTION UNDER THE INCOME TAX ACT.

OTHERS

COMPENSATION INCLUDES:

SALARY OR WAGES

COMMISSION

STOCK OPTION

FRINGE BENEFITS

BONUSES

DIRECTOR' FEES

NOTE:

(1) PAID BY THE RELATED GROUPS; WHICH INCLUDES INTERRELATIONSHIP OF MANAGEMENT SEC 3 (4)

(2) COMMISSION RATE CANNOT BE INCREASED EVEN TO MAINTAIN INCOME.

INITIAL GUIDELINES

COMPENSATION

MAXIMUM AVERAGE IN GROUP $2,400
OR SAY 10%

MAY VARY:

a) PER INDIVIDUAL IN SAME GROUP

b) CHANGE IN FUNCTION

c) OVERTIME

d) INCREASED PRODUCTION i.e. PIECEWORK BASIS

e) GREATER WORKLOAD

f) INCREASE IN VOLUME OF PROFESSIONAL PRACTICE

g) TO ELIMINATE SEX DISCRIMINATION

h) TO MAINTAIN LONG STANDING HISTORICAL RELATIONSHIP

i) TO OBTAIN OR TO KEEP AN EMPLOYEE.

PRICES AND PROFITS

RULE: COST PASS THROUGH

OR

PER CENT NET MARGIN (BEFORE TAX)

COST PASS THROUGH

MUST APPLY WHEN:

UNIT COST CAN OR IS ESTABLISHED

COST: A C B (ADJUSTED COST BASE)

SELLING: A P B (ADJUSTED PRICE BASE)

A P B (1) TO BE USED IS OCT 14-75 OR SELECT ANY PRICE WITHIN PREVIOUS 30 DAYS.

(2) PRICE CANNOT BE CHANGED MORE THAN ONCE EVERY 3 MONTHS

A C B BASED ON OCT 14-75

OR

(1) THE NEAREST ACCOUNTING PERIOD

i.e. WEEK, MONTH, QUARTER.

(2) NEW PRODUCTS:

a) BASE ON SIMILAR PRODUCT TO THE HIGHEST PRICE ON THE MARKET

b) IF NO SIMILAR PRODUCT MAY SET ANY PRICE.

PRICE INCLUDES:

(a) CUSTOMS DUTY

(b) TRANSPORTATION CHARGES
WHEN PAID BY SUPPLIER

(c) SERVICE SUCH AS INSTALLATION
WHEN NORMALLY INCLUDED.

COST COULD INCLUDE:

ESTIMATES OF FUTURE INCREASES

INCREASE COST EXCLUDES:

a) NON ALLOWABLE EXPENSES SUCH AS:

CAPITAL LOSSES

DISCRETIONARY EXPENSES ADVERTISING PROMOTION

b) EXCESSIVE COMPENSATION

c) EXCESS COST OVER FAIR MARKET VALUE

IN NON-ARM'S LENGTH TRANSACTIONS

d) EXTRAORDINARY ITEMS i.e. REPAIRS AND MAINTENANCE

PER CENT NET-MARGIN

95% (BEFORE TAX)

1) AVERAGE PAST FISCAL 5 YEARS

2) LOSSES MUST BE TAKEN INTO ACCOUNT

3) DISALLOWED EXPENSES MUST BE SUBTRACTED

4) IF 5 YEAR AVERAGE = A LOSS

SPECIAL PERMISSION GRANTED

5) COMPANY'S OPERATION MAY BE SPLIT BETWEEN

COST-PASS-THROUGH AND NET MARGIN.

NOTE

(1) RETAIL AND WHOLESALE FIRMS - BASE -

IS LAST FISCAL YEAR

(2) FOR COMPANY LESS THAN 5 YEARS

BOARD COULD SUPPLY A NET MARGIN FORMULA.

REDUCTION IN PRICE A P B

REQUIRED IF:

a) COST-PASS-THROUGH IS REDUCED

OR

b) PRE TAX MARGIN HAS INCREASED OVER 95%

EXCEPT

WHERE "UNUSUAL PRODUCTIVITY GAINS RESULTING FROM THE EFFORTS OF THE FIRM"

EX: a) MAJOR CAPITAL INVESTMENT

b) NEW TECHNOLOGY

INSURANCE PREMIUMS:

LIFE

AUTOMOBILE

FIRE AND OTHERS

ARE SUBJECT TO THE GUIDELINES

PREMIUMS MAY BE RAISED TO MEET INCREASED

COST OF OPERATION AND CLAIMS

ITEMS EXCLUDED:

(a) FARM AND FISH PRODUCTS AT THE PRODUCER LEVEL (PROCESSORS AND DISTRIBUTORS ARE SUBJECT TO GUIDELINES).

(b) NEW BUILDINGS FOR FIRST 5 YEARS

(c) COMPENSATION RECEIVED FROM OUTSIDE THE COUNTRY

(d) PRICE OF LAND

(e) BONDS, STOCKS, COMMODITY FUTURE

(f) PERSONAL PROPERTY, INCLUDING:
USED CARS, HOMES, FURNITURE
PAINTINGS, COLLECTOR'S ITEMS

(g) PENSION INCOME (BUT CHANGES IN PENSION PLANS MUST BE APPROUVED).

EXCESS REVENUE DERIVED IN CONTRAVENTION
SEC 20 (2)

ADMINISTRATOR MAY:

(a) PROHIBIT CONTINUATION OF CONTRAVENTION

(b) RETURN EXCESS TO CUSTOMER (IF IDENTIFIABLE)

(c) REBATE TO CUSTOMERS AMOUNT STATED BY ORDER

(d) REQUIRE PAYMENT OF EXCESS TO GOVERNMENT

EXCESS COMPENSATION OR DIVIDENDS PAID
SEC 20 (4)

ADMINISTRATOR MAY:

(a) PROHIBIT CONTINUATION OF CONTRAVENTION

(b) REQUIRE PAYMENT OF EXCESS TO GOVERNMENT - BY WITHHOLDING FROM SIMILAR FUTURE PAYMENTS

EXCESS REVENUE DERIVED OTHER THAN IN COURSE OF BUSINESS

(APPLIES TO RECIPIENT IF HE KNEW OR REASONABLY OUGHT TO HAVE KNOWN - HOW? - THAT HE WAS RECEIVING EXCESS COMPENSATION OR DIVIDEND)

ADMINISTRATOR MAY:

(a) PROHIBIT FROM RECEIVING ANY FURTHER EXCESS AMOUNT

(b) REQUIRE RE-IMBURSEMENT TO GOVERNMENT IF PAYER NOT REQUIRED TO DO SO.

PENALTY 25% FINE ON EXCESS (SEC 20 (6) and (7))

1. <u>APPEALS TO TRIBUNAL</u>

APPEALS AGAINST

SEC 20	–	EXCESS INCOME
21	–	EXCESS COMPENSATION OR DIVIDEND
22	–	PENALTY

DEPOSIT OF EXCESS MUST BE PAID TO

RECEIVER GENERAL BEFORE APPEAL (GUARANTEES).

MUST APPEAL WITHIN 60 DAYS OF ORDER – SEC 30 (1)

TRIBUNAL WILL DEAL AS INFORMALLY AND

EXPEDITIOUSLY AS POSSIBLE – SEC 31 (4).

2. <u>APPEALS FEDERAL COURT OF APPEAL</u>

3. <u>CABINET MAY OVER-RULE ADMINISTRATOR'S</u>

<u>DECISION</u>.

EXAMPLE: DOCTOR'S INCOME

PRICE AND INCOME CONTROL BY LIMITING

INCREASE IN FEES TO AMOUNTS NEEDED

TO RECOVER COST INCREASES AND

IMPROVE ANNUAL PERSONAL INCOME TO

MAXIMUM OF $2,400.

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FIRST SESSION—THIRTIETH PARLIAMENT
1974-75

THE SENATE OF CANADA

PROCEEDINGS OF THE

STANDING SENATE COMMITTEE ON

BANKING, TRADE AND COMMERCE

The Honourable SALTER A. HAYDEN, *Chairman*
The Honourable ALAN A. MACNAUGHTON, P.C., *Acting Chairman*

Issue No. 65

WEDNESDAY, NOVEMBER 26, 1975

Tenth Proceedings on:

"The *Subject-Matter* of Bill C-60, Bankruptcy Act, 1975"

(Witnesses: See Minutes of Proceedings)

29744—1

THE STANDING SENATE COMMITTEE ON BANKING, TRADE AND COMMERCE

The Honourable Salter A. Hayden, *Chairman*

The Honourable Senators:

Barrow	Hayden
Beaubien	Hays
Buckwold	Laird
Connolly (*Ottawa West*)	Lang
Cook	Macdonald (*Cape Breton*)
Desruisseaux	Macnaughton
Everett	McIlraith
*Flynn	Molson
Gélinas	*Perrault
Haig	Sullivan
	Walker—(19)

**Ex officio* members

(Quorum 5)

Order of Reference

Extract from the Minutes of the Proceedings of the Senate, May 13, 1975.

"The Honourable Senator Hayden moved, seconded by the Honourable Senator Bourget, P.C.:

That the Standing Senate Committee on Banking, Trade and Commerce be authorized to examine and report upon the subject-matter of the Bill C-60, intituled: "An Act respecting bankruptcy and insolvency", in advance of the said Bill coming before the Senate, or any matter relating thereto; and

That the Committee have power to engage the services of such counsel, staff and technical advisers as may be necessary for the purpose of the said examination.

After debate, and—
The question being put on the motion, it was—
Resolved in the affirmative."

Robert Fortier,
Clerk of the Senate.

29744—2

Minutes of Proceedings

Wednesday, November 26, 1975
(84)

Pursuant to adjournment and notice the Standing Senate Committee on Banking, Trade and Commerce met this day at 9:30 a.m.

SUBJECT: The *Subject-Matter* of Bill C-60, Bankruptcy Act, 1975.

Present: The Honourable Senators Hayden (*Chairman*), Barrow, Beaubien, Connolly (*Ottawa West*), Cook, Desruisseaux, Flynn, Haig, Laird, Macnaughton, Molson and Walker. (12)

In Attendance: Mr. David E. Baird and Mr. Melvin C. Zwaig, Advisors to the Committee.

The Chairman, having vacated the chair, the Honourable Senator Macnaughton assumed same as *Acting Chairman.*

WITNESSES:

Canadian Bankers Association:

Mr. Bradley Crawford, Counsel, of McCarthy and McCarthy;
Mr. J. G. Barraclough, Chairman, Bankruptcy Legislation Committee;
Mr. Norman Phipps, Vice-President, Credit Division, Canadian Imperial Bank of Commerce; and
Mr. J. P. Bernier, Assistant Legal Advisor, Canadian Bankers Association.

The Committee then proceeded to the consideration of the Bill and the examination of the witnesses following the presentation of their submission.

At 11:50 a.m., the Committee adjourned until 2.30 p.m. this day.

2:30 p.m.
(85)

At 2:30 p.m. the Committee *resumed* its consideration of the above subject.

Present: The Honourable Senators Hayden (*Chairman*), Barrow, Beaubien, Connolly (*Ottawa West*), Cook, Desruisseaux, Laird, Lang, Macnaughton, Molson and Walker. (11)

Present, not of the Committee: The Honourable Senator Lawson. (1)

In Attendance: Mr. David E. Baird and Mr. Melvin C. Zwaig, Advisors to the Committee.

WITNESSES:

The Canadian Institute of Chartered Accountants:

Mr. J. L. Biddell, Chairman, Bankruptcy Committee;
Mr. Harold S. Sigurdson, Committee member of Vancouver; and
Mr. H. R. Poultney, Q.C., Chairman of the Bankruptcy and Insolvency Committee, Board of Trade of Metropolitan Toronto.

The Committee then proceeded to the consideration of the Bill and the examination of the witnesses following the presentation of their submission.

At 4:15 p.m., the Committee adjourned until 9:30 a.m., November 27, 1975.

ATTEST:

Frank A. Jackson,
Clerk of the Committee.

The Standing Senate Committee on Banking, Trade and Commerce

Evidence

Ottawa, Wednesday, November 26, 1975

The Standing Senate Committee on Banking, Trade and Commerce met this day at 9.30 a.m. to consider the subject matter of Bill C-60, respecting bankruptcy and insolvency.

Senator Salter A. Hayden (*Chairman*) in the Chair.

The Chairman: Honourable senators, we will be receiving two submissions this morning, one from the Canadian Bankers' Association and the other a combined submission on behalf of the Canadian Institute of Chartered Accountants and The Board of Trade of Metropolitan Toronto.

In view of the makeup of the delegation from the Canadian Bankers' Association, I have asked Senator Macnaughton to take the chair while the committee hears the Association's submission.

Senator Alan A. Macnaughton (*Acting Chairman*) in the Chair.

The Acting Chairman: Honourable senators, the committee will hear first from the Canadian Bankers' Association. The witnesses on behalf of the Canadian Bankers' Association are as follows: Mr. Bradley Crawford of the law firm of McCarthy & McCarthy; Mr. Norman Phipps, Vice-President, Credit Division, Canadian Imperial Bank of Commerce; Mr. J. P. Bernier, Assistant Legal Adviser, Canadian Bankers' Association; and Mr. J. G. Barraclough, Chairman, Bankruptcy Legislation Committee, Canadian Bankers' Association.

Do you have an opening statement you wish to make, Mr. Crawford?

Mr. Bradley Crawford: As far as an opening statement is concerned, Mr. Chairman, we have attempted to put most of our effort into the written brief which, I believe, has already been presented to honourable senators. In today's format we will try to make some general statements and illustrations of the main themes or problem areas that we have identified in the bill.

As a general proposition, the Association, and the members of the Association, agree with the expressed desires of the departmental spokesmen and other witnesses who have appeared before this committee that the object of this bill is to rehabilitate honest debtors—and the Association certainly supports that—with the secondary motive, and equally important, perhaps, being to prevent abuses of the credit system, and the Association supports any amendments to the existing law to accomplish that.

The Association's position is that the bill can be improved. The members of the Association feel that there are areas of concern in the bill, particularly in connection with the position of secured creditors. I think the bill would introduce new risks, new costs, to lending, which will cause banks and other commercial and consumer lenders to review procedures that we feel are working properly now and, in fact, procedures that do promote the objectives of this bill, namely, to assist the rehabilitation of honest debtors and to prevent abuses of the credit system.

There is concern, as well, that the bill does not appear to have very clear transitional provisions; that is, it appears that if the bill were to be enacted in its present form, it would apply retroactively to loans made in the past and loan accounts that are still outstanding under agreements entered into in the past.

Perhaps I could put forward one more word of explanation. The brief was prepared largely early in the summer. We have been following the proceedings of this committee and have found them extremely useful. The brief raises some points, which I will try to identify as we go through, that I do not think cause us the same concern now as we felt at the time we were first looking at the bill, without the benefit of the discussion here and the discussion that has taken place in certain conferences held on the bill.

I hope members of the committee will feel free to ask questions as we go through the brief. I would draw your attention to the letter of transmittal to the chairman from Mr. Boyle, president of the Association, dated November 4, which identifies seven areas of principal concern that the banks have with this bill. What I would like to do is to go through those in the order in which the letter raises them, and bring forward material from the enclosed memorandum supporting the statements made in the letter and bringing out in more detail the points being made.

Senator Laird: Before you start on the detail, I should like to ask a general question. You have obviously given a considerable amount of study to this bill. You recognize, as we all do, that there are reforms needed. Is there any reason why the existing act could not be amended to effect those reforms without introducing an entirely new system, for example with an administrator assuming a lot of judicial functions? Have you given any thought to that general proposition?

Mr. Crawford: Only since this committee began to raise that issue. I do not think the brief addresses itself to that. I believe the Association tried to deal with the bill and respond to it as an offered piece of legislation. I would agree, as I think members of the Association generally would agree, that the nature of the problems we have with the bill as secured creditors are so pervasive that it seems to us that leaving a secured creditor in basically the same kind of position that he is now is really much to be preferred. We could get rid of about 40 pages of our brief if we were not concerned that we were being subjected to delays, interferences and additional costs through these provisions.

Senator Laird: In that connection, a member of the committee pointed out at the time—I remember raising this with one witness—that all existing jurisprudence will

be more or less useless if there is an entirely new act with a new system.

Mr. Crawford: That is always a problem with any new legislation. To an extent our brief has attempted to deal with that fairly and to meet the bill on that ground. Necessarily, there are always new terms that are unfamiliar at first, but they grow familiar. I agree that there are a number of areas where existing jurisprudence seems to be almost ignored. It took a lot of time, effort and cost to establish some of the rules we now have, and they seem to be working fairly well.

Senator Laird: Part of the advantage of the system of case law under which we operate on in doing business in most jurisdictions is that there is certainty involved. If there is an entirely new bill with an entirely new setup we would lose the certainty which surely a banker, as well as a businessman, finds most useful in making plans and projections.

Mr. Crawford: In establishing procedures as well. There is also the speed and cost of providing workable credit on a day-to-day basis to the business community.

Senator Laird: Precisely.

The Acting Chairman: Mr. Crawford, you have a brief and you wanted to make the main points in it. I think the best procedure would be if you started with the first point and worked your way through the brief.

Mr. Crawford: Thank you, Mr. Chairman.

The first point is the restriction on securing existing loans, in respect of which the principal clause is clause 161, which provides that:

> A transfer by way of a security interest is unenforceable against the trustee unless the transfer is made

Then it provides two time periods. It also says:

> . . . pursuant to an agreement entered into at the time the debt was incurred.

The present law on this point is contained in sections 73, 74 and 75 of the Bankruptcy Act. It is basically a law of preference, fraudulent preference as it is unsually called, although the Bankruptcy Act does not call it that. The idea is that within a certain number of days of bankruptcy, or within a certain number of days of entering into a transaction, if the transaction is to be open and completely public and above board the parties ought to register certain instruments, bills of sale and this kind of thing, they ought to make their transaction and abide by it. I think under the old law one of the earmarks of fraud was a transaction providing for secret security, or providing for security within a very short time prior to the declaration of bankruptcy.

Outside the area of fraudulent preference, however, where a transaction was at arms' length between parties dealing in the ordinary course, it was perfectly possible for a loan agreement, for example, to be executed sometimes days, or perhaps even weeks, after the initial credit had been agreed. A person goes to, say, his banker and requires a line of credit; if the banker knows the man and is basically familiar with the kind of security he can get, the money is often made available very quickly, which is what customers seem to require.

Under clause 161 of this bill, that practice would become extremely precarious. If there is to be some security, unless the transfer is made within 30 days after the debt for which the security interest is given pursuant to an agreement entered into at the time the debt was incurred, it becomes unenforceable against the trustee. Suppose something goes wrong in the preparation of the loan agreement in the lawyer's office, or suppose there is some difficulty in clearing away a prior charge in order that the security bargained for can be put in place. There is nothing unusual in that; it is simply an ordinary problem of documenting a transaction businessmen have earlier agreed upon. However, as we read the bill, if 30 days passed the transfer would become unenforceable.

Mr. Baird will correct me if I am wrong, but I believe that could be attacked at any time within the next five years, subject to the saving provision of clause 165; if the client became solvent at any time in the interval, the fact that he was insolvent at the time the security transaction was entered into would be cured. That many not be quite the protection it might appear to be on first examination, because a bank is providing a corporation with the basic working capital needs. Without the bank's support the corporation might not be solvent at any time during that period. Clause 165 will ameliorate the effects of that, but we find this principle puts on the normal borrowing or lending practice an impediment that we think is not in the best interests of the parties, and it seems almost to characterize as fraudulent something that is now quite common.

A second practice that might be jeopardized is that banks and other credit granters are accustomed to making an annual review of accounts. If the security originally taken for a loan shows indications of thinning or, as often happens, there is a new value somehow represented in the business such as unrealized appreciation of land value or building value, fresh credit might be advanced against that. Under the existing law, a transaction for a fresh advance on a new value is not a fraudulent preference; it is regarded as a perfectly ordinary transaction. We feel that clause 161 might inadvertently impair the efficacy of these transactions as well. This section will cause—and, Mr. Phipps, I believe you agree—almost insuperable difficulties with administering revolving credits, which is the basis of banking. That is, in principle, the objection we have to clause 161.

If the senators would refer to pages 24 and 25 of the memorandum, we have a number of suggestions for reform of the clause, or difficulties we have with the wording of the clause. Perhaps it is not necessary to go into those in great detail. I would just mention the difficulty of understanding when a transfer will be considered to have been made.

Take, for example, a corporation debenture containing a floating charge and an "after acquired property clause." If the transfer occurs when new assets come within the ambit of the floating charging language, then the section would have predictable scope or operation. It might be very different, indeed, if the transfer were required to be documented in some way.

Referring now to clause 161(1)(b). It says that unless the transfer is made within ten days of the acquisition of the property, on which the security interest is to be given, it becomes unenforceable against the trustee. As you see, it becomes terribly important to know what is required, in order to show that the transfer has been made in this way.

The bill contains a definition of "transfer" in clause 2, however, it does not assist in the interpretation of this. You can imagine the administrative difficulties that a bank would have in attempting to administer a loan secured by floating charge to a corporation, if every time new security were brought in under that floating charge there had to be some documentary evidence of a transfer, put in place within ten days of acquisition. It could not work.

The Acting Chairman: Mr. Crawford, are you prepared to answer some questions now? We have two experts to my left and we have a board of senators.

Mr. David E. Baird, adviser to the Committee: Mr. Crawford, what would the effect of this clause be on a normal building mortgage where you sign the mortgage and then have periodic advances, most of which would be beyond the thirty day period? Would this section invalidate that type of transaction?

Mr. Crawford: Mr. Phipps will be able to answer that.

Mr. Norman Phipps, Canadian Bankers' Association: This gets into the legal side of when you register the security. It is a question of when the security is registered. Offhand I would say, if the security were registered within the time limits, these advances could be made.

Mr. Baird: The transfer, in fact, is not made within thirty days after the debt was incurred but the transfer would be made prior to the debt being incurred.

Mr. Phipps: Yes, that is right.

Mr. Crawford: It would cause difficulties.

One of the points we raised in the brief is why it has to be after. As you pointed out, if it is before, you are not within the language of the clause. Surely you are not a peril to anyone by doing the transaction that way, yet you may be technically violating the language of clause 161.

Mr. Baird: The way I read it is the mortgage would be invalid because the transfer took place before the debt was incurred, before the money was advanced. You register your mortgage and the debt is not incurred until the money is actually advanced. That seems to invalidate that type of very normal common business transaction.

Mr. Phipps: Yes, you are right.

Senator Walker: Everyone is agreed on that.

The Chairman: Have you another point?

Mr. Baird: It is my submission that if the bank security is caught by the normal preference provisions of the bill, therefore, why is this clause in to further complicate matters? If it is a preference, it is caught by other provisions of the bill.

Mr. Crawford: That is our basic position. It seems to be wrongly associated with fraud. If it is intended to be a clause designed to prevent fraud, it has been expressed in such a way that it seems to us to unsettle non-fraudulent transactions and established practices.

Senator Walker: What would you suggest we do with clause 161—cut it out?

Senator Cook: There are other people besides banks involved; there are other creditors involved besides banks.

Mr. Crawford: Our recommendation is to allow security to be taken at any time, if in accordance with general agreement between the parties, and deal with fraud separately. If you identify fraud, then deal with it in the preferences sections of the bill.

The Acting Chairman: Shall we proceed with your second point, paragraph 2 on page 2 of your statement?

Mr. Crawford: Yes. I would mention, first of all, a related clause, clause 158 in the text of the brief at page 23. Clause 158 deals with preferences at arm's length. It makes them unenforceable against the trustee if made within less than six months; and other conditions are provided there.

At page 23 of our brief we state that we are concerned that the language of the section be not capable of a construction that would characterize as a "preference" a further advance of loan principal pursuant to a loan agreement by a lender such as a bank.

The concern arises in that the characterization of the relationship is that there is only one debt created by the original agreement between the bank and its customer to advance money. If advances were being made by a credit grantor under an agreement, even if those advances proceed to within even a very short time of bankruptcy we believe that those ought not be regarded as a "preference". If the bank decides to stay with its borrower and continue to advance under a loan agreement and is doing so in good faith, it is, in fact, promoting one of the major objectives, as we understand it, of this bill, and that is to attempt to rehabilitate an honest debtor.

I do not say clause 158 does make such advances a "preference". We think that perhaps some clarification will be useful to ensure that it cannot be characterized in that way.

Mr. Baird: Your problem is with the meaning of the word "transfer" and when the transfer actually takes place. My reading of the clause was that the transfer would take place not when the debt was incurred but when there was a transfer of the legal interest, or some interest in the property. How could that type of transfer take place when there is just a money advance?

Mr. Crawford: In reading this together with clause 161 I am thinking of a future advance which might be also secured with an additional piece of security, something of that nature. We see the two sections as bieng very closely related to the ability of a bank, or any other creditor, to stay with a borrower experiencing difficulties if they decide he is worthy of their continued support. We do not feel that technical rules within the bill, designed to prevent fraud, should impair that relationship.

The Acting Chairman: Shall we proceed then, Mr. Crawford?

Mr. Crawford: The second heading of our brief is "Subordination of security to unpaid wages." I do not intend to spend time on this. As I understand, from reading your proceedings and also in discussions with others, the departmental officials have agreed to reconsider the priority of wages to security interests, and the Association endorses that reconsideration. We had difficulties with that clause. I would simply say we endorse that reform.

The Acting Chairman: Anything else, honourable senators?

Mr. Crawford: Paragraph 3 deals with the "Realization of security" which may be taken by the secured creditor. The question of realization, I think, has to be looked at in three distinct contexts in order to be kept clear. The three contexts are first, where there ia a bankruptcy, second, where there is a commercial arrangement and third, where there is a consumer arrangement.

Dealing first with bankruptcy. I should like to quote remarks made by Mr. Baird to the committee in June at page 42:5 of the minutes of the committee. Mr. Baird said that "one of the most significant changes in our proposed bankruptcy bill is the treatment of secured creditors. Under the present Bankruptcy Act a secured creditor is left almost alone; he is allowed to proceed with realization on his security . . .", and he says that there is no stay created against him. Mr. Baird proceeds at some length and I would refer honourable senators to that.

Then with respect to the bill he says:

> The new bankruptcy bill has reversed this position entirely. Under the new bankruptcy proposals proceedings by secured creditors, are now stayed and they cannot be continued without leave of the court or other requirements being met.

He says:

> I think this will create a real problem, because when you have a petition for a bankruptcy order filed—the debtor has an opportunity of defending the proceedings. This defence might take two, three or four months before the final decision of the court is made . . .

and during that time proceedings are stayed and cannot be continued by a secured creditor.

Then Mr. Baird draws certain conclusions from that. He says:

> If you are in a position of holding a mortgage on property of the debtor you cannot start foreclosure proceedings, . . .Similarly, if you have a conditional sales contract on an asset of the debtor, such as the debtor's car, you cannot seize his car . . .

and so on. And then he proceeds to show some of the implications of the effect of that stay.

If these statements are correct interpretations of the bill—and I certainly share Mr. Baird's concern then the bill will raise serious difficulties for the secured creditors.

In fact, Mr. Baird, perhaps you can help me in deciding what force to give to the reference in clause 138, which, I think, is the basic clause dealing with this, to clauses 238, 240 and 242. If the draftsmen intended those clauses to supersede clause 138, I do not have quite the same difficulty Mr. Baird had with it, but if those clauses are not intended to supersede clause 138, then I share in full measure his concern.

Mr. Baird: Clause 238 gives the basic rights to the secured creditor.

Mr. Crawford: I was looking to subclause (3), which imposes a ten-day automatic stay.

Mr. Baird: If you follow along you will find that there is a further stay created by . . .

Mr. Crawford: Yes, by clause 240(2) and 241(6).

Mr. Baird: Yes. So effectively there is a stay of ten days and a further stay of ten days and a further stay of 30 days, and after notice is given to the trustee to give the trustee the opportunity to redeem. So there are stays of proceedings, but those stays only start in the event of a bankruptcy order being made. There is still the hiatus period between the filing of the petition and the making of the bankruptcy order, and that was really my major point.

Mr. Crawford: I see.

Mr. Baird: The point is that the time limits of these other stays only start running upon the making of a bankruptcy order.

Mr. Crawford: That then aggravates our difficulty with the bill. We were reading the sections that you and I have just referred to, clauses 238, 240 and following, as defining the length of time that could be taken up in stays when the secured creditor was not capable of doing anything to preserve the value of the security that he had taken. If these are to be added to clause 138 and, as you say, address themselves to the position after the order has been made other than during the period when the petition is filed, then the situation is simply that much worse.

Mr. Baird: There is still the right of going to court and getting leave to remove the stay.

Mr. Crawford: But of course delay is involved in that as well.

I think this more than anything else causes the members of the Association concern. If you think of a common, everyday example, you might have a small manufacturing business which has a line of credit with a bank which may be secured by a floating charge on inventory and perhaps some equipment. If the company gets into financial difficulties and the present practice is followed, the bank, or whoever holds the floating charge security, would be accustomed to appointing a reveiver under that to take possession of the business and to carry it on. Mr. Phipps perhaps would like to emphasize this from his practical experience, but to carry on the business and keep it going, to try to keep the cash flowing and keep the labour force together, to move the work in process through. All these things are done by the bank not only in its own interest, to try to realize on the security which has been given and to provide money to repay the debts, but it is also evident that such provisions are in the interests of the borrower and of other creditors of the borrower as well. So that the maximum value in the corporation can be realized and so that perhaps even the affairs of the business can be turned around and the business saved.

Mr. Phipps: If we found it necessary to place a receiver in the company, particularly if it is an industrial company, it is the usual practice that we would carry on the day-to-day business, working through the work in progress, and that the receiver would in the meantime be assessing the business. At times you can arrange a possible sale of the business and figure what is best to do, whether that will be liquidation or carrying-on. Very often businesses carry on for a considerable period of time under a receivership and can come back out again.

If there were delays when we went in with the receiver, however, there would very likely be a termination of the business, because there are orders flowing to the business's customers, there is the work force to condider and the plant which may be mortgaged by others and so on. If we carry on without interruption, if can only be in the best interests of all creditors and of the customers as well.

The bill would certainly make it most difficult for us to carry on a viable operation, because if the company were to stop for a week or two weeks it could disintegrate quite quickly.

Senator Laird: In actual practice do you find that you do endeavour to rescue the company in that fashion in the proper instance?

Mr. Phipps: Yes, if it is possible and the receiver can work the business through, it is done. I do not say that percentagewise that is the way it is, but certainly it is our wish that the company be made viable again. Very often they are not, however.

Senator Cook: It seems to me, Mr. Chairman, that the receiver would be quite irresponsible if he were to go in and run up a wage bill of $2,000 or $3,000 per man. I think the receiver has to be jolly careful. I can understand him owing the employees a couple of weeks' wages at worst, but I cannot see him running up a bill of a couple of thousand dollars. There should be a preference there.

Mr. Phipps: Under the Bank Act, if we are working within the security of the company's inventory, then the wage earners have a preference. That, of course, applies throughout the banking system.

Senator Cook: To what extent?

Mr. Phipps: If we are realizing on security, all wages have first claim against realization of inventory.

Mr. Crawford: It would be quite unfair, otherwise.

Mr. Melvin C. Zwaig, Adviser to the Committee: Mr. Phipps, would the Bankers' Association be amenable to having the receiver continue realizing, even if a bankruptcy did intervene, and establishing a system of reporting to the trustee and/or the courts on the realization, on a progressive basis? I think on of the present problems with regard to realization, outside of the existing Bankruptcy Act, is that the trustee, acting on behalf of the mass of creditors, is really kept in the dark until the realization is total.

Mr. Crawford: If I could interject one idea here, the bill seems to be ambiguous with regard to whether the bank's receiver or other secured creditors' receiver could act as a trustee in bankruptcy. I believe it is not an uncommon pratice at present if there has to be a bankruptcy, for the receiver, who knows the business, essentially, after he has been there a short time—perhaps a month or two—to be the trustee. The bill appears to preclude that, in clause 30. Clause 30 says:

> Except on such conditions as may be prescribed, no trustee shall, while he is the trustee of an estate, act for or assist a secured creditor of the estate . . .

Later on in the bill, in clause 344(b), the court is given power to permit a receiver to act on such terms as the court may think fit. It is difficult to read both clauses of the bill consistently. I think the reason for raising it at this point is that if he is the same man there is no problem of communication.

Mr. Zwaig: I would like to assume that he is not the same man, because that is where the complexities would arise.

Mr. Phipps: I am not aware that there needs to be a lack of communication between the two parties.

Mr. Zwaig: I think this is the complaint, and also the drive in this Bankruptcy bill, that under the existing act there appears to be, and there is, a definite lack of communication between the two parties.

Mr. Baird: I have had clients complain to me that the receiver says, "It is none of your business. I am acting for the bank, and I am not prepared to give you any information. You are not my client. I have no legal obligation to tell you what is going on." The receiver bluntly refuses to advise the creditor of the present status.

Mr. Phipps: I am not aware of that situation. I think that would be an abuse.

The Acting Chairman: Any further comment, Mr. Crawford?

Mr. Crawford: The clause permits conservatory measures to be taken by a secured creditor through the period of stay and delay that is imposed on him. I believe, Senator Laird, our best position is to agree with you, that the existing law should be preserved, subject perhaps to some minor amendments such as Mr. Zwaig was referring to, which would coordinate the efforts of representatives of other creditors. If the law is to be changed we think that the conservatory measures which are permitted to be taken by the secured creditor during the period of extensive delay which, as you can see, may run six, nine months, are provided in clause 240(5). They appear to us to be rather narrower than they need to be to protect other interests; that is, they apply only where the property subject to the security interest is perishable, or likely to depreciate rapidly in value.

Of course, there are other circumstances that are easily imaginable where a secured creditor could act in accordance with the duty that he has under the act, which is to act in a reasonably prudent and diligent manner, to realize the assets much more quickly than the bill would appear to contemplate, and not involving perishable goods. Take seasonable goods—skis, or other sporting equipment, or toys, for example. If those goods are not shipped by August or September at the latest, they miss the season, and although they may not depreciate rapidly in value, certainly the chances of making a commercially reasonable realization that year are lost.

Senator Cook: Christmas cards?

Mr. Crawford: Christmas cards, when there is no strike.

Mr. Baird: You used the term "commercially reasonable manner", and the bill uses the term "reasonably prudent and diligent manner."

Mr. Crawford: They are different, are they not?

Mr. Baird: Could you explain how they differ?

Mr. Crawford: I do not know. This goes back to the point we began with. The phrase "commercially reasonable" is now beginning to appear in legislation in this country. The Personal Property Security Act of Ontario uses it. It is also appearing in legislation in the United States, on which, basically, the Ontario act was modelled, which permits a secured creditor to do anything that is reasonably necessary and commercially reasonable. It is a question of fact for a businessman to say whether he acted in a proper way under the circumstances that faced him. Prudence may be a higher duty, I do not know. It is a matter of choosing words that have not been given judicial interpretation and

are not in common use, and thereby importing a degree of uncertainty that need not be there.

Senator Walker: Perhaps the committee that developed this legislation got that idea in Mexico during one of its trips. As a matter of fact, this is a horrible bill, is it not? Would it not be almost faster to get a new committee and have a new draft of the bill? This one seems to be impossible I have not heard anybody agree with any great part of it. There is no expert who has been here so far who has not damned it up and down. Is it too late to junk it?

The Acting Chairman: Well, if you are asking the chairman, I am not going to answer that this morning.

Mr. Baird, you had a comment you wished to make.

Mr. Baird: Yes, Mr. Chairman. There has been a concern—I think, possibly, not with the larger banks, but with other secured creditors—that the trustee in bankruptcy is not given a reasonable opportunity to inspect the assets and determine whether or not there is any equity for the bankrupt estate. This, as I understand it, is why the stay of proceedings is imposed on secured creditors, namely, to give the trustee a reasonable chance to find out what is involved, what the items concerned are worth, to get outside opinions, and then decide whether or not he is going to redeem by borrowing money and paying off the secured creditors. Do you feel that some period of time could be given to the trustee for this purpose?

Mr. Crawford: If you impose a duty on the secured creditor of doing what is commercially reasonable, and you also impose a damages liability upon him, as this bill does, should he fail to act in a commercially reasonable manner, it seems to me that, subject to the one point of evidence, which might not be available to question that judgment, you have done everything you need to for the protection of the others. There is now, under the existing law, a short period that is permitted during which the trustee may inspect.

Mr. Baird: The trustee is given the right to inspect under the present law, yes.

Mr. Crawford: Yes. The only thing is that in the context of this bill 30 days is provided, certainly, but if 30 days is provided you may be confident that it will be taken in at least some cases, and it may be just too long, in the circumstances, to continue to permit commercially reasonable realization.

Mr. Baird: What would your reaction be to a time-limit of 15 days, or 15 days after the first meetings of creditors, whichever is the longer? The problem with the trustee in bankruptcy is that he is not settled in place; he does not have his inspectors appointed until the first meeting, and if there is a time-limit imposed upon him in the interim between the date of the bankruptcy and the first meeting of the creditors, then he is under a serious disadvantage.

Mr. Phipps: It seems to me that if you are, for example, in a manufacturing operation, a 15-day period of shutdown under the prevailing circumstances would effectively close that business.

Mr. Crawford: The workers would disperse, the work-in-process would not be completed, the orders could not be filled and the business would come to a halt.

Mr. Baird: What would be the effect if you were permitted to carry on the business in the normal course but not complete a sale as in the normal course of business, a sale in bulk?

Mr. Crawford: That would be better. But ingenuity does not fail to throw up other suggestions for protecting the creditors from wrongful conduct by a secured creditor. If you impose upon him the duty of acting in a commercially reasonable manner and you are concerned that a damage action might not be fruitful against the average secured creditor, then one could think of requiring that the proceeds be put into a trust account for a short time with an assured deposit-taking institution. In that way the whole proceeds would be available for the settlement of disputes if the trustee felt that the rights of others had been interfered with.

Mr. Zwaig: Therefore you are supporting the idea that the receiver and the trustee in bankruptcy should be two people rather than one?

Mr. Crawford: We do not feel that it is always necessary that they should be two people, no. In fact one of the criticisms we have of the bill is the ambiguity as to whether it will permit what we think is a beneficial practice of enabling the receiver to be the trustee, where he is licenced to do so, and to so act. I do not think that is one of our problems.

Senator Cook: And that is forbidden by which section?

Mr. Baird: Clause 30 is the one which provides that a trustee shall not act for a secured creditor except on specific terms which shall be prescribed by the regulations. We do not know what the terms are. The chartered accountants, in their brief, have outlined draft regulations, but this is the first time the committee has seen suggestions of what the regulations might involve.

Senator Cook: Can this section be made effective by proper regulations?

Mr. Baird: I would prefer to see it done by amendment to the statute itself.

Mr. Zwaig: We would prefer it in the legislation rather than in the regulations.

The Acting Chairman: Shall we proceed to number 4?

Mr. Crawford: If I could raise one final point, Mr. Chairman, that is that this duty of commercial reasonableness, that we recommend, has been recognized in the bill. It is mentioned in clause 343(2) in connection with the liability of a receiver in Part IX of the act. The bill now imposes a duty on secured creditors of acting in a reasonably prudent and diligent manner. That seems to us to contrast rather unfairly with the duty imposed upon the trustee to act merely in good faith. This is in clause 35. The bill would impose a duty upon a secured creditor to act in a reasonably prudent and diligent manner, which may be quite a high standard of care. But the trustee, by the first clause of section 35 of the act, appears to fulfil his duty under the act if he merely acts in good faith whether with or without skill in the matter at all. It seems to us to be odd that a licensed trustee who is a skilled professional practising his profession should be subject to a lesser duty than a secured creditor who may not have nearly the training, the expertise or the advice available to the trustee.

Senator Laird: As long as he is acting in good faith.

Mr. Crawford: Yes, and the courts have not seen fit to interpret that as being a terribly high standard. You will recall that in the Bills of Exchange Act a person may act in good faith if he acts negligently but honestly. The courts in the United States have characterized this as having "a pure heart and an empty head."

Senator Walker: That describes a great number of people.

Mr. Crawford: I mentioned that there are three areas in which we would like to look at the difficulty placed in the path of a secured creditor by this bill. The second is the area of commercial arrangements. The stay of proceedings is applicable here to creditors having admissible claims. The principle clause is clause 95(4). That reads in part:

> (4) Where a proposal has been filed with respect to a debtor, no creditor of the debtor may exercise a remedy against the debtor or his property . . . or continue a proceeding for a claim admissible under section 103 . . .

We have had some difficulty in construing the bill to know what claims are admissible. Clause 103 speaks to this point, but we find ambiguity in the treatment of this term, particularly if you think of claims that may be secured in part and unsecured in part. Clause 103 of the bill deals with this point in the following words:

> 103. Where a creditor is to be affected by an arrangement, he has an admissible claim under the arrangement for any debt of the debtor owing to the creditor . . .

And then it goes on and says:

> . . . whether the debt is liquidated or not, absolute or contingent, certain or litigious, or payable immediately or at a future time.

Is it intended by that clause to include secured debts, debts for which there is security? Is it intended by that clause to include all debts owing to that creditor if there is some admissible debt, perhaps a debt which is not secured? It does say, "for any debt of the debtor owing to the creditor". If you lent a man a thousand dollars secured on his car and one hundred dollars on open account, would all that be admissible, would some of it be admissible, or would none of it be admissible? We find difficulty in interpreting the bill. Must a secured creditor come in under a commercial arrangement? I believe the present practice is that he need not.

Mr. Baird: You are quite correct; he is not affected by a proposal which is the present equivalent of a commercial arrangement.

Mr. Crawford: Do you read the bill as necessarily involving a secured creditor in commercial arrangements?

Mr. Baird: No, it appears to be optional. From my reading of the bill, the debtor has the right to make a proposal only to unsecured creditors, or to both secured and unsecured creditors. It is my submission that your problem is created by the word "creditor", because "creditor" is defined as either a secured or unsecured creditor, and he could be both. It could be a proposal made only to unsecured creditors, but because the bank is partially secured and partially unsecured he could be caught by that. Do you wish clarification of that point?

Mr. Crawford: We do.

Senator Laird: Another dangerous word also included there is "contingent".

Mr. Baird: It is extremely broad.

Senator Laird: Just think what could be brought in under that.

Mr. Baird: But you still want the cleansing effect of a commercial arrangement and to be in a position to be able to deal with all outstanding claims. You want to put the existing liabilities to bed; you want to be able to discharge them by virtue of a commercial arrangement. This is one of the main goals to be accomplished. Contingent claims clearly create difficulties, but we think it still should be covered by a commercial arrangement, because frequently it is used by an outside group buying up the shares and they want to be satisfied that existing obligations are dealt with and discharged.

Mr. Crawford: Thank you, Mr. Baird. A second difficulty we have with commercial arrangements is in the definition of classes of creditors. This has come before your committee before and other representations have been made, I believe, by your experts with respect to the difficulties of defining a class. It is clause 284(3), and I believe earlier discussions focused on the fact that the chairman at the first meeting may define classes. Clause 284(3) provides that:

> Whether they are secured or unsecured, creditors whose claims rank at the same level in an order of priority set out in this Act and are payable from the proceeds of the same property constitute a separate class.

We have two difficulties with that, one, with each limb of the proposed definition. The first is that the phrase "priorities established by this Act", does not exhaust all material priorities which may exist among secured creditors.

Mr. Baird: The act does not create priorities between secured creditors.

Mr. Crawford: No; it only recognizes those.

Mr. Baird: Where does it recognize them?

Mr. Crawford: I am not sure exactly how to read clause 284(3), but does it not say that one class will be all creditors, which can include secured creditors, whose claims rank at the same level in an order of priority set out in this act? There is an order of priority set out in clause 254(1)(L). All creditors are lumped in under that paragraph. Would it be possible, for example, to differentiate there between the rights of the holder of a first charge when there are two charges created by a debtor on one asset? Is it possible to distinguish between the first and the second mortgagee, or charge holder under that clause?

Mr. Baird: I do not think clause 254(1)(h) is intended to deal with priorities of secured creditors. It is basically the clause that deals with the distribution of the assets in a bankrupt estate.

Mr. Crawford: I agree.

Mr. Baird: Normally, after payment or satisfaction of the claims of secured creditors, would there be funds left over to pay the class of creditors referred to in paragraph (h)?

Mr. Crawford: That would be so if it could be established that the secured creditors were not brought into the arrangement and would not have to look to the act to recognize the priority that, for example, the provincial law of personal property security might give them by reason of prior registration, or prior notice.

Mr. Zwaig: Paragraph (h) deals, in my opinion, with the ordinary unsecured creditors, so, as a matter of fact, if the secured creditor had a portion of this claim unsecured he would certainly fall under paragraph (h).

Mr. Crawford: Maybe a practical example would make it clear: Clause 284(3) speaks about lumping in one class, creditors whose claims are payable from the proceeds of the same property. If two creditors take an assignment of receivables from the debtor, for example, a bank may have a general assignment of receivables and a subsequent general assignment may be taken by another credit grantor, those are one property. Presumably the receivables constitute one property. Both creditors look to be paid out of the proceeds of that one property. Are they one class, although one is first in accordance with the provincial law which created the charge and one second, or are they still one class, lumped together?

The clause provides that priorities recognized by the act may be preserved. Turning to the bill, I endeavoured to find a scheme which recognizes priorities established by provincial law. All I could find was clause 254. I agree, though, with all the comments you have made, that it does not really answer all the needs of the case. Really that is the point I am making.

Senator Flynn: I do not know; even if there is a secured claim, such as a mortgage, it seems to me that is not a class and it would not be considered to be a creditor under clause 254 in practice. It is only by the order of priority that claims are paid. Only when you come to *pari passu* are you a class; otherwise, I do not think this problem would arise.

Mr. Crawford: Do you not think that there would be difficulties if secured creditors were brought in?

Senator Flynn: The act still respects the secured creditor. Otherwise, it is provided in this bill that the secured creditor goes alone or, if there are two, they do their best with what they have.

Mr. Crawford: It is a problem which we have experienced in attempting to interpret the legislation and it is covered in our brief, so perhaps we could leave it with the committee for consideration. The importance of the point is obviously that once characterized as a member of a class all creditors in that class may have their rights affected by a vote of a three-quarters majority of the creditors of the class. If the secured creditors are to be classed and if the classes are not sensitive to the priority that the secured creditors have bargained for and obtained in accordance with the provincial law, then it seems to us that the bill requires clarification and modification.

Mr. Baird: You would be satisfied if each of the creditors had the same priority as they have under provincial law?

Mr. Crawford: Yes.

Senator Flynn: Of course, we have the same problem: Does provincial law create only a priority? Is the creditor considered as a secured creditor, or a preferred creditor? This is the problem. If you could clarify that once and for all it would certainly be helpful. "Preferred" and "secured" are not the same. "Preferred" may be created by the act, but it also may be created by the provincial law.

Mr. Crawford: The third area in which we discovered reason for concern is the realization procedures permitted a secured creditor in the area of consumer arrangements. I think the principal clause is 68, which appears at page 69 of the orange book. It provides: "Upon the filing of a request by a debtor—" this is a consumer debtor. The section continues: "—no creditor of that debtor who would have an admissible claim if an arrangement were made . . ." and so on. Now, I suppose the way to interpret that is to attempt to divine from the simple filing of a request, if possible, what arrangement might be made, because, of course, an arrangement can provide many things. As we read it, any creditor who would have an admissible claim, if an arrangement were made, is stayed. However, how are we to ascertain if there would be an admissible claim until the proposal is seen?

Mr. Baird: It is my understanding, from reading the bill, that admissible claims for consumer arrangements differ from the admissible claims on a commercial arrangement. I read clause 77 to be that there is a specific category of claims which are admissible under a consumer arrangement and it is not dependent upon the actual terms of the arrangement. In a commercial arrangement, I read the act to provide that admissible claims are those claims which are affected to the arrangement.

Mr. Crawford: That is a possible interpretation, I agree. If you try to read the bill as applying consistent principle to the test of admissible claims through both commercial and consumer arrangements, you have great difficulties. If you read it as applying a separate test, as you suggested, in the area of consumer arrangements, then there is less difficulty. But working, as we were, on our own, we were unable to ascertain or satisfy ourselves. I think this is another reason for our request that there be some clarification of some of these concepts. To a degree this is what I meant to advert to in my opening statement, when I said that with repeated exposure one becomes more familiar. One's immediate reaction is, "I don't understand any of this. I understood the old law. Take away all of this new." We are trying to get beneath that and offer real criticism where we find it is warranted, and try to improve the bill.

Senator Laird: Just like the Income Tax Act!

Mr. Crawford: If you take Mr. Baird's interpretation of clause 77, it makes all claims admissible, secured or unsecured, except as specifically excepted. There are three areas of exception. If I can characterize them—they are lumped under clauses 77 and 233—we might call them debts of a higher order—judicial debts, or specialties, in one sense of the word. Putting those to one side, there are certain classes of claims under clause 78 which are not admissible. "Not admissible" in this sense, you must remember, means that the secured creditor is left in the position that the present law leaves him. That is, he may take his security—with one significant exception—and realize upon it without hindrance in the working out of the arrangement. The exception is that if he is within clause 78, he must take the security and forego the debtor's covenant. Mr. Baird, do you agree with that?

Mr. Baird: Yes, I do. That is my interpretation of the new bill.

Mr. Crawford: So it becomes important to see what . . .

Senator Connolly: Is that an absolute option?

Mr. Baird: No, it is not. It is an option that is available depending on whether the security was given and how much has been paid off. With respect to an extension arrangement, a secured creditor is caught by the arrangement and his claim is admissible—which means his right to stay—unless less than two-thirds has been paid and the security was given within 60 days of the making of the arrangement; otherwise the secured creditor is subject to the extension arrangement.

Mr. Crawford: We find that difficult to understand. The two-thirds appears to us to be rational. That is, unless I have wrongly advised the Association, I understood that it reflected the current consumer protection laws in the provinces which now pretty generally—there may be exceptions—provide that where more than two-thirds has been paid by a consumer debtor, the secured creditor may repossess only with the consent of the judge. I understand that to be an attempt to recognize that a person who has nearly paid off the obligation which he undertook should be protected to a higher degree than someone who defaults early and has no equity, or less equity, in the transaction.

So requiring a secured creditor, who still has an unimpaired right to repossess, to stay out of the arrangement and to look only to his security makes some sense. The 60 days, however, does not appear to reflect any existing law, and we have difficulty seeing why it is there, what it is attempting to do, and why it is made applicable only to extensions and not to compositions. It is simply an undigested lump, in our thinking.

Senator Connolly: It raises the presumption that if it is done within 60 days, it is done for the purpose of preferring.

Senator Flynn: The suspect period is extended to 60 days from the 30 days at present.

Senator Connolly: That is the purpose of any special kind of arrangement within that period before the bankruptcy.

Mr. Crawford: The idea being that if you have taken security within that 60-day period, you must be . . .

Senator Connolly: I do not know the specific provision, but it seems to me that if you do it in good faith, you probably have the onus of saying that it was not for the purpose of giving preference to that secured creditor or of defrauding other creditors.

Mr. Crawford: Clause 78 defines a class of claims which is not admissible—in respect of which the secured creditor may not claim under the arrangement. It provides two attributes: less than two-thirds must be paid and the security interest must be given quite recently. If the security interest is given quite recently and less than two-thirds has been paid, he may not come in. He may take his security. If the business reason you have suggested is correct, it seems backwards. You would want to bring in the person who is attempting to get some sort of preference or fraudulent priority. You must make his asset available for the claims of all creditors. Allowing him to realize on the security of the asset, unimpaired and untouched by the arrangement, seems backwards.

Mr. Baird: I think it is designed not to attack the creditor, but to protect the creditor from a debtor who goes out and buys a Cadillac and then makes an extension arrangement within 30 days after buying the car. Under the extension arrangement, he is entitled to continue using the car and pay over a period of time. I think they have picked an arbitrary period within which there is borrowing and granting of security and the secured creditor has the right to repossess his car. He is not forced to leave it in the possession of the debtor. This is an attempt to give the secured creditor a certain amount of protection from an unscrupulous debtor.

Mr. Crawford: Renegotiating the terms of the contract after the event!

Mr. Baird: Yes. He agrees to pay it off in a year, and he could then make an extension arrangement to pay it off in three years and be entitled to use his car. Whether 60 days is the right length of time is anyone's opinion.

Mr. Crawford: It may, in fact, be too short.

The Acting Chairman: Can we proceed with section 4?

Mr. Crawford: Mr. Chairman, I have a few more points to express. We have some difficulty in reconciling the provisions of clause 78 with provisions of a later part of the bill, which also is extended to consumer arrangements by clause 89—specifically clause 241, subclauses 2 and 3. This part of our argument is laid out on page 10, and following, of the memorandum delivered with the president's letter.

Basically, if I can paraphrase, under clause 241 the administrator may elect to redeem security or to require realization of it under the following subsection; but under clause 78 the secured creditor may elect not to participate in an arrangement, but take his security and give up the covenant. It seems to us that there is a conflict here. If the administrator elects to redeem, by virtue of the power he is given in clause 240 and later clauses of the bill but the secured creditor elects to keep the security and give up the covenant, there are opposing elections and no indication in the bill as to how they are to be reconciled.

The effect on a secured creditor agreeing to participate is not clear to us. The conditions on which some secured creditors must take their security and release the debtor from his promise to pay is clear enough, and we adressed ourselves to some of the difficulties we have in that respect. However, if the secured creditor elects the other way and decides to participate in the arrangement, the bill does not seem to provide for that. There is no machinery, no mechanism, by which he would surrender his security. What happens to it? What becomes of the security?

Mr. Baird: Does he not just keep his security? From my reading of the bill, he would retain his security, but cannot enforce it unless there has been a default and the arrangement has been actually set aside. At that point in time, as I understand it, he would retain his right to realize on the asset any balance still owing to him.

Mr. Crawford: What about his claim, then, to the deficiency?

Mr. Baird: He would then be entitled to his deficiency claim, because the deficiency claim is only barred had he elected not to participate in the arrangement. Would that interpretation create a problem for you?

Mr. Crawford: We did not see that interpretation, so I do not think we are prepared to deal with it. I would like to quote your own words from an earlier meeting, Mr. Baird, if I may, when you said, "The wording of clause 78 is very

difficult to figure out." I think you put it in a nutshell. I have looked at your words with some comfort over the past weeks.

Senator Flynn: As I read the clause, it seems to me that anyone who has a claim that is not admissible under clause 78 would have to rely only on the security. It would not be admissible for anyone in that position to enter into the arrangement. He has to be satisfied with what he has.

Senator Connolly: Even in respect of the deficiency?

Senator Flynn: That is something else. We are dealing with the security. If he has a fair claim, then he can go on with it. However, an arrangement can only involve those creditors who have an admissible claim under the section. The rest stay outside.

Senator Connolly: If he realized on his security and found that there was a deficiency, the question then, as I understand it, is whether the covenant that he has from the debtor entitles him to share . . .

Senator Flynn: He repays his claim in its entirety.

Mr. Baird: If he had the right to elect, he loses that right under clause 78(5). The problem arises in the event that he did not have the right to elect—for example, if he was a mortgagee of real property.

Senator Flynn: He cannot force his creditor under the arrangement. That is the principle.

Mr. Baird: Yes.

Senator Flynn: So, he retains his rights in their entirety.

Mr. Crawford: Our recommendation in this respect is that more clarification be given to this area. I think some of the discussion we have heard this morning would indicate that we have less of a problem than we at first thought. We have suggested some areas where we think clarification could be given, and perhaps we would have less difficulty if that were done.

Turning now to the question of set-off, the principal clause of the bill in this respect is clause 235. If I can characterize it in this way, we have two principal problems with this proposal, one being of principle and the other of the terminology in which this proposal is phrased or couched in the bill.

The present use by banks of the set-offs is important to them in administering loan agreements with their customers. The banks having extended credit to a commercial borrower, or even a consumer borrower, monitor that cash flow, and even though they may be aware of credit difficulties, or perhaps even solvency difficulties, that the customer is experiencing, they are in the habit, because they are able to monitor the cash flow, of permitting cheques to be cashed and deposits entered. In other words, they allow the business, as nearly as possible, to continue in the ordinary course. However, if clause 235(2)(b) is to be construed as preventing banks from claiming against any balance representing deposits made in the 10 days immediately preceding the bankruptcy petition, then the ability of the banks to continue to allow indulgence in this fashion in the operation of accounts and the use of balances, whether hypothecated or not, will require very careful reassessment.

If this clause were to remove from the ability of the banks the balance created in the 10 days immediately preceding the petition, they would have to guard themselves much more carefully and slow the flow of cash which, in a time of financial difficulty for the borrower, would be the least possible thing desired.

Senator Laird: It could be disastrous.

Senator Flynn: Is that not the present position?

Mr. Crawford: It is not the present position.

Mr. Baird: The present position, I think, would be that any claim would be considered a preference if it is paid to the bank within the preceding three months. I think Mr. Crawford's position is that if the bank receives a payment of $10,000 and honoured a cheque for $10,000, it would be caught under this section, although its net position remained the same. In other words, it would not get any benefit from the transaction, but it would have to repay the $10,000 to the trustee in bankruptcy. Is that the real problem, Mr. Crawford?

Mr. Crawford: That is it precisely, yes.

Senator Cook: Where in the bill is the 10-day period set out?

Mr. Baird: Clause 235(2)(b). I envisage a running balance in a shaky account which you could not touch for 10 days, even though you would have otherwise honoured a cheque on that account?

Mr. Crawford: That is right.

Mr. Phipps: And that would not be practical under the circumstances that would prevail.

Mr. Crawford: On the technical side, I simply point out that other statutes that deal with set-off have required a fair amount of interpretation and, in fact, have required that interpretation even though they began with a fuller description of what kinds of debts might be set-off one against the other than does Bill C-60. Clause 235(1) merely states:

> Where two persons have amounts owing, one to the other, . . .

It does not even use the old word "debt"; it uses the word "amounts," which may or may not be debts, and it goes on to provide for a set-off. I would refer the expert advisers to the committee to pages 33 and following of our memorandum.

Senator Flynn: There is a difference between the English and French texts.

Mr. Crawford: We have noticed that occasionally has happened in the translation process.

Senator Flynn: The French version refers to a person who is at once a debtor and a creditor, whereas the English text says:

> Where two persons have amounts owing, one to the other, . . .

The French text is much clearer.

Mr. Crawford: Under the Judicature Act of Ontario it has been found necessary for the courts to provide that set-off may not be made unless the debts are liquidated and not merely damages claimed, and unless they are due at the time and immediately payable, not statute limited or

prescribed. Further, the debts must be mutual, being made by the parties to each other in the same capacity, and on, and on. It is a difficult area of the law which has required a great deal of jurisprudence to clarify. As a technical matter, I am concerned that clause 235 may lose for us the benefit of that jurisprudence unless there is provision to incorporate it.

May I turn to paragraph 5 of our brief, "Assignment of Book Debts", dealing with accounts receivable? Here, again, there are two points of principle and two points which are merely terminology. Dealing with the principle first, I direct attention to clause 169. Basically, we object to the principle that seems to be reflected there:

> where any acts are required by law to be performed before a transfer is effective against third parties, and such acts have not been performed within thirty days after the transfer the transfer is deemed to have been made ...

Then certain circumstances are provided. In conjunction with this we must read clause 166, which sets out initially to make all transfers of debts unenforceable. In subclause (2) it saves certain transfers. The first one, paragraph (a), is where the transfer:

> ... is governed by a statute that provides for the perfection ...

... and so on. The present practice is, if the bank takes a general assignment of accounts receivable it would register that general assignment so that other creditors would know the receivables were being claimed by the bank, and would not rely on those, except to the extent that they may represent value more than is necessary to satisfy the bank. The bank does not give notice to the persons whose accounts have been transferred in this fashion; it permits the debtor to continue to collect his accounts in the ordinary course—to deal with his own customers.

We are concerned because in clause 169 the term "third parties" includes the persons who owe the money to the debtor. It has been judicially determined that registration by the bank of the general assignment of book debts, while it is sufficient and adequate protection against creditors of the debtor and the trustee of the debtor, is no protection at all in his dealings with the account debtor until the bank has given notice to the account debtor of its interest in those receivables. Clause 169 would inadvertently require a major change in the present practice. Instead of the bank being able to take a general assignment, as they now do and to register it so that other credit grantors may know of its existence, put it in the file and forget about it and let the debtor go about his business, clause 169 almost seems to require that every account debtor now be notified of the bank's interest. Typically now, if a bank gives formal notice that they are interested in a debtor's receivables, that is tantamount to broadcasting his insolvency or impending commercial defeat. If our reading of the clause is correct, it is so contrary existing practices that it would be a complete reversal of everyone's understanding of the present law.

Senator Laird: And it would not accomplish what Mr. Phipps says is the practice, endeavouring to keep the business going.

Mr. Crawford: That is right.

Senator Cook: Assignments of debts are registered, are they not?

Mr. Crawford: They are registered, but the leading case in the Supreme Court of Canada of less than 10 years ago determined that registration did not complete the task facing the assignee, the person taking the assignment. If he requires to be perfectly safe against all third parties, including the person who owes the money, he has to give notice to that person. The bill seems to proceed on a mistaken interpretation of law, that registration somehow is all that needs to be done. I simply point out that that is now the existing law, and there would be a hidden danger in enacting a clause such as clause 169.

Senator Cook: Some of these clauses seem to go a bit far in infringing on the customs under the Bank Act, which have been going on year after year, in an atempt, a proper attempt sometimes, to forbid or restrict transactions other than transactions in the ordinary course of business with the bank. That seems to be the burden of it.

Senator Flynn: I do not know to which case you refer.

Mr. Crawford: It is in our brief.

Senator Flynn: If the Bank Act does not require the bank to give notive to each and every debtor of the client, this clause would not apply. The case to which you are referring must be a special one.

Mr. Crawford: I do not believe it is special.

Senator Flynn: I would be curious to have examples of what you have in mind.

Mr. Baird: An example I can think of—I am not sure whether it is Mr. Crawford's example—is the situation where the Department of National Revenue has served a third party demand on a debtor of the bankrupt company, and the courts have held that if the department serves the third party demand before the bank gives notice under its assignment of book debts, then the department has priority. Therefore, the timing of the notice is very significant. This is an Ontario decision. I am not sure whether the same law would apply under the Civil Code of Quebec.

Senator Flynn: I do not think that provision would affect the situation.

Mr. Crawford: The case I was referring to and the argument I have just made are set out on page 28 of the memorandum of the Association, dealing with clause 169.

Senator Flynn: Do you think this clause would make the position worse than it is presently?

Mr. Crawford: It changes the position and would require us to do something that is not now required, and which would be misunderstood if we were to do it under present business practices.

Senator Flynn: You just said that as a rule you do not advise the debtors of your client, that in some cases the court has said it was not sufficient simply to register without giving notice. How would clause 169 make your position worse?

Mr. Crawford: It would require us to do every act ...

Senator Flynn: You have just said that the case requires you to do it, so I do not see how you could be in a worse position.

Mr. Crawford: I beg your pardon. You have to concentrate on the party against whom the assignment is being

held to be invalid in the scope of clause 169. There is no question at all that registration is now effective against the creditors of the person who is passing you the accounts receivable as security, and his trustees, and persons who claim in that fashion. There is no question that that is all that is required now by registration under the present law. If there is a second assignment of that receivable to someone else, who takes it in good faith and without notice of your existence, that second assignee may take priority over you even if you were first in time; the second man may take priority over you if he notifies the account debtor first.

Senator Connolly: Despite registration?

Mr. Crawford: Despite registration. That is a different person. With that state of the law . . .

Senator Connolly: Let me stop you right there. Could the second assignee normally protect himself by consulting the register to see if there was someone before him? Surely the registration gives the first assignee priority.

Mr. Crawford: I can only refer you to the Supreme Court of Canada case that we set out in the brief. He does not.

Mr. Baird: He does not have priority if he has notice. If he has notice of the prior assignment he does not get priority. There are two tests, on my understanding, of when priority is given. There is priority of notice if the second assignee is aware of the first assignment at the time he takes the second assignment; he is always behind, he can never improve his position. If he is not aware of the first assignment when he takes his assignment and gives notice first, then he has priority. I think that is what Mr. Crawford is saying.

Senator Connolly: I think that is right. That is what the witness is saying. I say that surely if the first assignee has registered, a subsequent assignee . . .

Mr. Crawford: That is the problem, that is not notice.

Senator Connolly: —a subsequent assignee has the onus to check the register. It is the way it is done with chattel mortgages, real estate mortgages, or anything that involves registering. What is the point of registering?

Mr. Crawford: That question has been asked many times. I think it comes down again to the idea of good faith. We mentioned earlier that a person may be in good faith, although he acts negligently. It would be prudent for every person, before taking an assignment of the account, to check the register. Of course, there are certain things which could be registered that would not preclude a subsequent assignment, such as a registration of a general floating charge over receivables. It has been established for many years that a specific assignment may take priority. Although it would be prudent to do this, it is clear the law does not require this.

Senator Connolly: Your point is that the law should not require it?

Mr. Crawford: No, sir, my point is simply to describe the existing law and show that it is necessary, under the existing law, to notify the account-debtor in order to be able to satisfy that you have priority against all third parties. Then, I turn to clause 169.

Clause 169 says that if you have not done everything that must be done, in order to give you priority against all third parties by law, then your priority is lost and the assignment is treated as though it had been made one moment before the petition, which would make it a preference. All kinds of unfortunate consequences would arise.

It seems to me that the draftman did not take the same view that I am representing is the law now, or he would not have used the words "third parties" or, he would have excepted account-debtor.

Senator Laird: Do you agree with this, Mr. Baird?

Mr. Baird: It depends on which provincial law you are talking about. He is quite correct when talking about assignment of book debts for the province of Ontario. It is not deemed to be notice to all the world, if you register under The Assignment of Book Debts Act in the province of Ontario. It is not deemed notice to every party. If you register a mortgage, under the Registry Act system in Ontario, it is deemed to be notice to all parties. So, the law is perfectly correct, as Mr. Crawford states, with respect to that particular problem, the assignment of book debts in Ontario. I am not prepared to comment on other provinces and other statutes.

Senator Flynn: What is required by law from the bank is provided in the Bank Act, or elsewhere, to get the usual security? However, let us say that nothing is changed by the new legislation and let us erase clause 169. What are you going to do about this problem? Are you going to give notice to everyone?

Mr. Crawford: It would not then be necessary, senator. We would not change the established practice of letting our customers deal with their own customers.

Senator Flynn: Are you afraid that you would be in the position which you have created by the decision you referred to?

Senator Cook: In other words, Senator Flynn is saying if you do not change clause 169, then you do . . .

Mr. Crawford: Yes, we would have to change that. I am sorry, I misunderstood you.

Senator Flynn: What you want is a correction of the present situation.

Mr. Crawford: Either that or a change from clause 169.

Senator Flynn: What you say is that clause 169 does not help you.

Mr. Crawford: In the present situation clause 169 creates a difficulty for us.

Senator Flynn: An added difficulty?

Mr. Crawford: Yes.

Senator Flynn: If you have given notice to everyone, you are not in a worse position.

Mr. Crawford: To give notice to everyone would be an extraordinary procedure; it would be misunderstood.

Senator Flynn: The decision, to which you refer, requires you to do it.

Mr. Crawford: Only against one person, senator.

Senator Flynn: Any person who may be affected, of course, but if you want to play safe you will have to give notice to everyone.

Mr. Crawford: It is a question of business risk, senator. You may be prepared to take the risk that some subsequent assignee may take one or two specific accounts out from under your general assignment. You might not be prepared to take a risk that would make it unenforceable against the trustee.

Senator Connolly: How would you do it? Would you simply insert a provision in clause 169 to the effect that registration is, in fact, notice to the world?

Senator Flynn: You would have to change the Bank Act. You are not referring only to the Bank Act, but to any legal provision requiring . . .

Senator Connolly: We would have to change the Bankruptcy Act.

Senator Flynn: Well, try to define what "law" means in line 2. It would have to be something else in the Bank Act and it would have to refer to all the legal provisions, either federal or provincial, concerning notice to be given, or registration to be made.

Mr. Baird: A possible amendment would be to make reference . . .

Senator Flynn: In the Bank Act saying that registration is sufficient; no notice is required. That is the problem. What I say is your position is not worse by this clause 169. What really is the problem is the interpretation given to the Bank Act by the court. So, you should change the Bank Act.

Senator Cook: It is worse because under this clause the whole general assignment goes out the window, whereas under this clause all that goes out the window is if I owe some money and if I assign something over to you . . .

Senator Flynn: You might be in the same position because in this particular case they lost and they could lose against everyone involved.

Mr. Baird: It is possible to say that before transfers effective against a trustee in bankruptcy, or the creditors generally of the assignor, or the debtor, as opposed to third parties—that might correct your problem.

Mr. Crawford: That is right. It is because of the breadth of the term "third parties" that the difficulty has arisen.

Senator Cook: Say that again, please?

Mr. Baird: It might be possible to substitute for the words "third parties" the words "a trustee in bankruptcy of the debtor, or creditors generally of the debtor" so that the only acts that are required to be performed by law are those acts which make a transfer effective against a trustee in bakruptcy of the debtor, or the creditors generally of the debtor. Under our law now, if we register an assignment of book debts, it provides that the assignment of book debts is valid as against the trustee in bankruptcy of the debtor.

Senator Cook: In other words, the trustee in bankruptcy should not have any more rights than the debtor himself?

Mr. Baird: That is right; if there is registration.

Senator Cook: It seems fair enough.

Mr. Crawford: Before leaving clause 166, I would like to raise two technical points briefly, in order to put them on the record.

Earlier I referred to subclause 2 of that clause and its use in paragraph (a) of the term "perfection." The clause makes unenforceable transfers of debts, and then excepts those which are governed by a statute, or provides for the perfection of such transfer by registration.

I think it is a laudible attempt by the draftsman to bring into the federal Bankruptcy Act some of the terminology which is now becoming more common in this area of the law, through the use of new terms in the statute such as I mentioned arlier, the Personal Property Security Act of Ontario. I believe, British Columbia, Manitoba and Nova Scotia are also considering legislation of this nature.

The difficulty is that they have chosen a term of extreme technicality: "perfection". The existing statutes, taking Ontario as an example, do not use that term. It seems to me that during the period of transition, or during the period in which other provinces remain with the old style legislation—they have not yet brought their legislation up to date with the Personal Property Security Act—reference to a term as technical as "perfection" might give rise to difficulties of interpretation as to whether a statute, such as The Corporation Securities Regulation Act in Ontario, provides for "perfection."

One way to determine whether a statute provides for "perfection" is to go to the provincial act and see whether it provides for "perfection." If it does not use those words, or words of similar import, you may find that even though you have complied with provincial law, you may not have complied with a statute that "provides for perfection." There may be a technical hiatus during the transition period.

Senator Hayden: What meaning are you giving to the word "perfection"?

Senator Cook: It means completion, does it not?

Mr. Crawford: It is not defined, is it?

The Acting Chairman: No.

Mr. Crawford: "Perfection" in The Personal Property Security Act, senator, is a technical term which requires either taking possession of the property, the collateral, or registering in a particular registry.

Senator Hayden: Could that not mean "to complete"?

Mr. Crawford: If it were given a general interpretation, the problem would disappear. They have used a technical term and my conern is that the provincial laws are changing gradually and giving real content to a new term of art. It may not have been intended as a term of art but it may be construed as a term of art. If it is, there will be difficulties in doing what the statutes require you to do.

Senator Hayden: "Perfection" ordinarily means to complete.

Mr. Crawford: I guess it means to complete perfectly.

Mr. Baird: "Perfection" as we know it in the new language is based on taking all necessary steps to make the transaction valid as against third parties. The transaction can be binding and valid between the two parties to it, and still not be "perfected." And yet it is not registered, and registration might make it valid as against all the world.

Mr. Crawford: This is not one of the cardinal points in the brief. It is a technical point which I address really for the purposes of clarification.

Senator Hayden: What word would you prefer in place of "perfection"?

Mr. Crawford: I see no reason why it does not simply say "that it is governed by a statute that provides for the registration". I do not see what is added by "perfection" other than difficulty. If you register your corporate debenture under The Corporation Securities Registration Act of Ontario you have done what that statute requires. Presumably that is what is meant.

Senator Hayden: Instead of wasting time on trying to settle what the word means and what the problems are, why not substitute a word that will give the meaning without any doubt?

Mr. Crawford: As I say, if you simply took out the word or reference to "perfection" and simply provided for registration, that would be adequate.

Senator Hayden: That is right.

Senator Connolly: If that is what is wanted, that is the word to use.

The Acting Chairman: Shall we proceed?

Mr. Crawford: The other difficulty is again technical. If you will refer to the language of clause 166(1) it talks about "where a person transfers debts due." This again is a minor technical point, but it makes all transfers of debts unenforceable. If you come down, then, to the saving provision of the second clause, it only excepts transfers of "accounts receivable or loans receivable". Why does it not talk about "debts" there? Is it not possible for these to be matters within the prohibiting language of (1) which cannot be brought within the apparent saving language of (2) because a different term has been used without apparently any reason for it? Again that is a minor point. I simply wish to place it on the record.

The other clause of substance, clause 83(2), deals with consumer debtors. You may wonder why there is a provision here for assignment of accounts receivable by a consumer. I remind you again that the definition of a debtor in this part of the bill includes small businessmen, many of whom are customers of banks, not having debts in excess of $10,000 at the time the arrangement is imposed. The two-fold definition of debtor, excepting only those persons who both carry on business *and* have debts in excess of $10,000, means that there may be accounts receivable from a small businessman governed by this consumer arrangement part of the bill.

Mr. Baird: What is wrong with that? Do we not want to give the man a fresh start? If it is an assignment of book debt, should his rights not cease as of the date he makes an arrangement? Otherwise it might carry on forever and he would never get relief.

Mr. Crawford: It is a question of how you read clause 83. With the provision there, will it still be possible for a small businessman to use his accounts receivable as collateral on which he may raise advances from lenders such as a bank? If clause 83(2) means that the assignment ceases to apply to any debts that "become due" after the making of the arrangement, then the collateral is not available to the creditor at the very time that he wants it. Is that not the effect?

Mr. Baird: I read it to say that clause 83(2) only applies to an assignment made by the debtor before he makes an arrangement so that if he wishes to give security on accounts receivable arising after the date of his arrangement, he would have to execute a new document.

Mr. Crawford: But what does "become receivable" mean then in that subsection? "Is of no effect in respect of accounts and loans that become receivable after an arrangement is made"—does that mean that having given an assignment of his receivables to a bank, the consumer debtor, by making an arrangement, can avoid the ability of the bank to collect on those receivables?

Mr. Baird: I see your problem.

Senator Flynn: He cannot transfer something that he has already transferred. It is not a problem of bankruptcy; it is a problem of arrangement.

Mr. Crawford: It is a question, senator, if I may say so, of what the scope of clause 83(2) is. Is it intended to nullify any assignments of receivables made by small businessmen?

Senator Flynn: Your claim is not admissible under an arrangement. Is that correct? Can we start from that premise? Your claim, guaranteed by the guarantee provided in the Bank Act, is not admissible under an arrangement. You are staying out of it. If he wants to assign future receivables, he cannot assign something he has already transferred to you. You are staying out of it. That would be completely nullified with regard to the other creditors.

Mr. Crawford: The clause states that an assignment of existing or future accounts made by a debtor before he makes an arrangement is of no effect in respect of accounts that become receivable after the arrangement, and my concern is, quite apart from whether we are brought within the arrangement or not as secured creditors, does that mean that an assignment of receivables given by a small businessman ceases to be effective in the hands of the secured creditor if he makes an arrangement? If so, the effect of the bill is to make it impossible for him to raise money on his receivables.

Senator Cook: Surely only in respect of future debts.

Mr. Crawford: "Becomes receivable."

Senator Cook: But only in respect of future debts, debts after the assignment.

Senator Connolly: There may be a problem here. Let us take a practical example. If on a given day a small businessman assigns certain receivables, some of which will not be due for a couple of months hence, and in the meantime he either goes bankrupt or makes an arrangement. Does this then mean that the debts that have not fallen due for a period until a date after the arrangement cannot be collected by the assignee?

Mr. Crawford: That is it exactly.

Senator Cook: It says "in respect of accounts and loans that become receivable after an arrangement."

Mr. Baird: Where the debt arises or the obligation to pay arises after an arrangement is made.

Senator Cook: It is clear in my mind. Perhaps the language is uncomfortable, but it is clear that it means fresh debts not covered by the previous assignment.

Mr. Crawford: That would be much preferable and no one would object to that.

Mr. Phipps: I believe that is the intention, but it seems to read as if the receivables were not due until a later date.

Senator Cook: As if you were on a monthly account, in other words.

Mr. Baird: I think that in principle we are in general agreement with your objection. We do not want to prevent the bank from collecting debts which arise prior to a bankruptcy but which do not become payable until after the date of the arrangement.

Mr. Crawford: If you could clarify the clause in that manner, that would answer our objection completely.

I will move now to point 6, the subordination of amounts paid.

I think the members of the Association have two, perhaps three, principal difficulties with this. The rate of 5 per cent seems inordinately low. I meant, before coming to the committee hearing, to check information on the present rate at which the Bank of Canada loans to chartered banks. I believe it is higher than 5 per cent.

It seems that a figure has been taken that bears no relationship to modern business conditions at all; but assuming that interest at 5 per cent is to be involved, or some higher rate, interest at a rate exceeding whatever rate is finally chosen is subordinated by clause 254 to some rather curious claims.

Perhaps I could direct your attention to this clause, which is the one that provides the order of payments. If a secured creditor has not been able to obtain satisfaction of the amounts owing to him by way both of principle and interest, you will note that his claim for interest in excess of the prescribed rate, which seems inordinately low, comes in at page 131 of the orange book at clause (i) (vi). You need only cast your eye up the page to see the kinds of things that are given priority over that, such as claims arising out of a gift.

Senator Laird: Low on the totem pole.

Mr. Crawford: They are very low on the totem pole, and are particularly low when you look at the rate that has been chosen. Our recommendation is that a more realistic rate be chosen, or set by regulation, or tied by the legislation to the bank prime, or something of that kind.

Senator Cook: On the other hand, you might consider yourself lucky to get any interest at all.

Mr. Baird: Are you in agreement with the fixing of any rate, or with this type of provision generally?

Mr. Crawford: I think our brief recommends that if something is done in this manner, it be tied to the prime rate.

Mr. Baird: Do you not think this would cause the trustee in bankruptcy great administrative problems in trying to sort out an account to determine what portion of it is at what rate?

Mr. Crawford: That is the second part of the objection. The second part I really have yet to state, and that is, as you mentioned, the sorting out of the account. In clause 257 (3) the trustee is authorized to reallocate amounts in any account that has been settled within three years of bankruptcy, which is an enormous administrative and accounting task.

Mr. Zwaig: I think this would be almost impossible to administer. I think it would be very difficult and very costly, and certainly it would delay the administration of a bankruptcy estate.

Senator Cook: Suppose he has been in the hands of a loan shark, or something of that nature, in those circumstances this sort of thing is good. They have caused the bankruptcy in the last three years.

Mr. Crawford: Five per cent hardly makes you a loan shark, or the Bank of Canada is certainly in that category.

Senator Cook: I am talking about circumstances in which the interest is over 5 per cent. This does not apply to interest at 5 per cent. It applies to interest over 5 per cent.

Mr. Zwaig: In cases where we have dealt with problems of excessive interest charging, we have gone to the courts, and in fact have had the excess interest allocated as a downpayment of capital. In the two cases that I have experienced of this type of think we have been successful in doing that.

Senator Cook: Clause 257 would help you with that problem.

Mr. Crawford: The three-year period also should not escape attention. You said that if a man had been in the hands of a loan shark, this might be extremely valuable. If he has given a fraudulent preference to someone, for example, under clause 159 that becomes unreviewable after one year, but this is reviewable for three years. It would be an enormous task to try to reallocate amounts of those proportions.

Senator Cook: It might be worthwhile doing if there was something worthwhile involved.

Mr. Crawford: It might be worthwhile if it could somehow be limited to fraudulent practices, to which I do not think anyone would object, and after all, this is one of the purposes of the bill, to prevent abuses of the credit system, if it could be somehow limited to that.

This clause seems to us to be another example of a laudable intention on the part of the draftsmen being expressed in terms that are perhaps not quite as sensitive as they might be to business practices and to realities as we understand them.

I think that is all we wanted to say on that, Mr. Chairman. Could I move on to point 7 in our letter of transmittal?

The Acting Chairman: Seizure of records?

Mr. Crawford: Yes. The principle clause here—there are two, actually—is clause 53(2). The Superintendent has power, under this clause, for purposes of inquiry or investigation, with the approval of the court, which may be given *ex parte*, to enter any building or place where he reasonably believes that there are records of other property that may afford evidence in connection with proceedings under this act, and may seize such records or any such property.

Under section 96(4) of the existing Bank Act, there is provision for a measure of protection for banks against the kind of disruption of their own affairs that might be—in fact, we think, would be—caused by the exercise of this

kind of power to seize; because you will notice that it is not limited to records of the bankrupt, but includes any records which may afford evidence of any offence in connection with any proceedings under the act. That power is extremely broad, even when exercised with the consent of the court.

Mr. Baird: Is this not similar to our present section 6(2) of the present Bank Act? Has that caused a problem to date? This was introduced in 1966, and to my knowledge it has not been abused, nor has it caused a problem.

Senator Flynn: Is the wording similar?

Mr. Baird: Very similar.

Senator Flynn: How does it read?

Mr. Baird: Section 6 (2) of the existing act reads as follows:

> (2) For the purposes of an investigation under subsection (1), the Superintendent or any person duly authorized by him in writing, with the approval of the court, which may be given upon an *ex parte* application, may, either alone or together with such peace officers as he calls on to assist him, enter and search, if necessary by force, any building, receptable or place for books, records, papers or documents that may afford evidence as to an offence in connection with a bankruptcy and examine any such books, records, papers or documents.

Senator Flynn: You will notice that in the present bill the reference is to an offence "under this or any other act of Parliament". I was wondering why they would give the power to the superintendent to conduct an investigation into something which is not related to the bankruptcy.

Mr. Crawford: I think the reason, as far as the Association is concerned, is spelled out more thoroughly in another clause.

Senator Flynn: I know. I was just underlining the difference there.

Mr. Baird: Section 6 reads:

> books, records, papers or documents that may afford evidence as to an offence in connection with a bankruptcy . . .

Senator Flynn: That is much better than "under this or any other act of Parliament". Just imagine the superintendent becoming the watchdog for any offence under the Criminal Code, or the income tax legislation, or something of that kind. It seems to me to be much too wide.

Mr. Baird: The words "offence in connection with a bankruptcy" are vague and could be interpreted in many different ways. Does it mean that there has to be an offence?

Senator Flynn: There has to be a relationship. I cannot understand why something has to be done in connection with "this or any other act of Parliament". If it is in connection with a bankruptcy, it is all right, I guess; but it does not even require that. It says, "under this or any other act of Parliament". It seems to me there could be some abuse of this clause, or use of it for purposes which are not intended.

Senator Laird: It could interfere with the affairs of another bankrupt customer.

Mr. Crawford: Yes, and this is, I think, really, the reason for the expression of our concern. Since 1966 the tendency of banks to centralize their record-keeping in computerized data centres has greatly increased, and we anticipate that it will increase more, so whereas entry into and seizure of records in a branch at an intersection in some city in the mid-west may not affect very many people, entry by sheriff or superintendent to the data centre of one of the major banks in or around Toronto or even one of the regional centres could wreak havoc. It might even happen that the bank might have to close its doors while the man walked off with the tape containing all the information on that day's transactions.

Mr. Baird: But if you limit it to a search of the branch and all the records are in the central data system, then the search would be worthless.

Mr. Crawford: No, the Bank Act now provides for searching at branches and for copies of documents to be made, et cetera. And, of course, even though there is a high degree of computerization, copies of accounts—what are called "hard copies" I believe—are made available at the branches for inspection by customers and others. We have no objection to that kind of operation.

Senator Flynn: But surely you do not expect special treatment for the banks.

Senator Connolly: I do not think anybody wants to plead for special treatment for the banks, but I think, Mr. Chairman, that the way this subclause (2) is drawn in the light of the computerization of information raises a very important point not only for banks, but, I think, for business generally, so far as record-keeping is concerned and the problems that record-keepers have. I think the witness points out very accurately—and here I must say I do not know very much about computers—that if you take away a tape that has a little information on it relating to a bankruptcy, you might at the same time also take away great gobs of the information about other things that are important to the bank in its daily operations. We are in a new kind of era when it comes to computers.

Mr. Crawford: That is the situation exactly, senator.

Senator Flynn: But if you think of the practices of the Income Tax Department, you realize that this is not a problem only for the banks; it is a problem connected with general provisions regarding searches.

Senator Connolly: But we may have a specific problem here.

Senator Flynn: But you cannot distinguish that problem from any other.

Mr. Crawford: I agree that changing the bankruptcy bill would not solve the problem for all persons in all contexts, but I think that once the problem has been identified, it must be dealt with.

Senator Flynn: You are right; you can identify it, but you cannot correct it here in this bill.

Mr. Crawford: But I think something must be done about it, senator.

Senator Flynn: I would agree that the reference to "any other act of Parliament" is something that should be corrected.

Senator Laird: It should be eliminated.

Senator Flynn: But trying to establish a system of search under the Bankruptcy Act without doing it in other legislation, I do not see how we can do that.

Senator Connolly: I think, perhaps, the purpose of the objection is related to the taking of information over and above that required to deal with the problem arising out of a bankruptcy. If the section can restrict the right to seize only the material required in connection with the bankruptcy, it may be tax information or it may be other information, but if it is related to the bankruptcy, then it is not going to disrupt the computer program.

The Acting Chairman: As the witness says, closing the bank for a day or two.

Senator Flynn: But you could do that to any other institution.

Mr. Zwaig: If the powers of investigation were the same as under the present act, in which case we eliminate the offence committed under any other act of Parliament, would that satisfy your point?

Mr. Crawford: I do not think so.

Mr. Zwaig: Because if you are looking for powers of investigation as it relates to a specific bankruptcy file, the information could be made readily available under the supervision of the seizing officer. I do not think that even in the age of computers a print-out could be made on the transactions affecting the client being investigated.

Mr. Crawford: Your proposal is that the custodian of the records be compelled to produce some readable form of the evidence and that could be taken away?

Mr. Zwaig: That is right.

Mr. Crawford: That would certainly go a long way towards correcting the difficulty.

Senator Connolly: Really, what we are saying is this. Under the old system and before the computers came into being, if a seizure of this kind were to be made normally you would just go to the bank and seize the file. So what you want to get is the information in concrete form that would be comparable to the information that was in that file.

Senator Flynn: You may have to produce in the execution of a search warrant, but I cannot see that we are in a position to provide a remedy here. We have seen instances of the Income Tax Department upsetting companies and creating disruptions by taking away all the records, but in some cases that is lack of judgment or abuse of some kind. But normally, if the problem relates to a given bankruptcy, then I am in accord with Mr. Zwaig, that this could be done without disrupting the affairs of the bank, but I do not see how we can take into consideration the specific problem of computers here.

Mr. Crawford: I think Mr. Zwaig has suggested one way that it might be done, senator.

Senator Flynn: If the trustee had any judgment at all, it might be done in another way.

Senator Cook: Mr. Chairman, could I revert for one moment to the matter of a claim for interest in excess of 5 per cent? This does, I agree, seem to be a completely unreallistic figure. On the other hand, I think the claim could be a useful one where an estate has been denuded by excessive interest over a number of years. How would you manage with something like this:

> Calculated at a rate in excess of the usual bank rate for debts of a similar kind.

Or something of that nature. That would protect the usual transaction in the normal course of events, and at the same time it would enable the trustee to go after cases where the bankrupt had been paying interest rates of, as they have been in some cases, 25 per cent.

Mr. Crawford: That is a very attractive suggestion, senator.

Mr. Baird: I do not think you should limit it to bank rates because other lending institutions have different types of rates.

Senator Cook: But we have to find a target or something to hit at. If it were 1 per cent more or less you would not interfere, but you are only going to act when it is grossly in excess. But you have to have a measure to do that.

Mr. Baird: Some form of unconscionable interest rate.

Senator Cook: Yes.

The Acting Chairman: Honourable Senators, I understand that Mr. Crawford has several other points, but at this stage he is prepared to make a closing statement.

Mr. Crawford: I am in the hands of the committee, and if you wish to carry on asking questions, I think other members of the delegations would be pleased to respond. I would simply like to place on the record again and emphasize what I said in my opening statement. I believe the Association put considerable effort into the preparation of its written document and senators will notice that it is keyed to individual changes so that when you are reading the bill it will be easy for you to turn to the specific clause to find the comments of the Association on that clause. I hope to direct the attention of your experts to those. I shall not take the time now to highlight them, although there were two or three that we were prepared to go into in detail.

We have enjoyed our discussion with you and wish to thank you very much for the hearing you have given us.

The Acting Chairman: Honourable senators, on your behalf I may say that this has certainly been one of the best presentations we have had before this committee for some time, and it is very much appreciated. If there is anything further you want to say, Mr. Crawford, you had better say it now.

Mr. Crawford: Thank you very much.

Senator Salter A. Hayden (*Chairman*) in the chair.

The Chairman: Honourable senators, we have another brief and must settle how we intend to deal with it. Mr. Biddell, would it inconvenience you seriously if we did not start consideration until 2:30 this afternoon?

Mr. Biddell: That would be perfectly satisfactory, sir; we will be here.

The Chairman: It is up to the committee; some of them have been working hard this morning while I have had the opportunity of working less. Will that time suit our experts?

Mr. Baird: Yes, Mr. Chairman.

Mr. Zwaig: Yes, Mr. Chairman.

The Chairman: Is it agreed that we meet at 2:30 p.m.? I have created an embarrassing situation for myself so far as Albert Poissant is concerned, because I told him that we may be ready in the latter part of the afternoon to spend a little more time with him considering Bill C-73. So, when we arrive at that stage in the late afternoon and if a quorum is still available, we may decide to work a little longer. These are pushing times.

We will adjourn until 2.30 p.m., at which time the first item will be consideration of the briefs of the Institute of Chartered Accountants, and the Board of Trade of Metropolitan Toronto.

The committee adjourned until 2.30 p.m.

The committee resumed at 2.30 p.m.

The Chairman: Honourable senators, we will proceed now to consider the submissions to be made on behalf of the Canadian Institute of Chartered Accountants. Mr. Biddell will be making the presentation. Mr. Biddell, will you come forward, please, and present your panel? Although a certain amount of duplication is in order, there is a special rule against unnecessary duplication.

Mr. J. L. Biddell, Chairman, Bankruptcy Committee, Canadian Institute of Chartered Accountants: Mr. Chairman, with me, on my right, is Mr. Harold Sigurdson, chartered accountant of Vancouver, who is a member of the Bankruptcy Committee of the Canadian Institute of Chartered Accountants. On his right is Mr. Harold Poultney, Q.C., who is a member of the Bankruptcy and Insolvency Committee of the Toronto Board of Trade. Since these two committees have been doing much of their work jointly and because a number of members are on each of those committees, we decided that we would deal with this, provided you are agreeable, as more or less a joint submission.

The Board of Trade of Metropolitan Toronto does not have a written submission at this time, although it has had quite a number of meetings. Mr. Poultney will speak to certain of the matters on which we wish to comment today. I may say at the outset that, in the case of each committee, our submissions are preliminary only. We have endeavoured to deal with what we thought were the most important aspects of this bill. However, as we have pointed out in the CICA submission, there are certain areas that we have not covered at all and plan on doing so, as we expect we will see this bill again in a somewhat revised form. At that time both of those bodies will do what they did in the past, come in with a clause-by-clause written submission to this committee.

The way we plan to handle this, Mr. Chairman, if we may, is to have you refer to the section of the CICA brief at the front, which is a summary of our recommendations. I do not propose to deal with every one of them. The group before you has picked out certain ones which we would like to speak to, and, of course, any of us would be happy to try to answer questions that you have on these or any other aspects of the matter.

The first section that we thought we would refer to orally is the section headed "Agents and directors" on the first page of the summary. Mr. Sigurdson would like to make one or two comments on that subject.

Mr. H. S. Sigurdson, Member, Bankruptcy Committee, Canadian Institute of Chartered Accountants: Honourable senators, we are somewhat concerned about the matter of agents, which is a new concept of the bankruptcy bill. It includes directors and officers; and the penalties that relate to them are somewhat severe. It includes any person who manages indirectly or directly a business, or who has directly or indirectly *de facto* control of the business.

The definition, for example, includes a consultant who might become an agent. The penalties imposed by this section are very severe. It has the undesirable effect of making it difficult or dangerous for an agent that is a director or officer to attempt to restore a failing company to good health.

Clearly, we think that any action taken by a director or officer or consultant, or any agent, who in the best interest of the company attempts to restore a company that is in difficulty, to good health, should not be subject to impunitive conditions. We also think that this particular section provides an opportunity for blackmail on the part of the trustees, who wish to blackmail directors or receivers or agents as well as the others that I have named. It makes a former agent financially responsible for any deficiency, if the business is carried out in the interest of the company, or by someone related to him.

By "someone related to him" it might be the company itself, that is, the officer or director who is attempting to restore a company to good health may be the principle shareholder of the company and whatever he does, he does indirectly for himself, for his own benefit.

Many small businesses and many large businesses also might be construed to be insolvent, under a more objective view, and any attempt to salvage it from that point—the measure of the quantum of the loss that might be attributed to the directors at the time that he was attempting to restore the company to good health, might be attributable to him, if it could be measured.

Just by way of an example, a construction company might be in poor circumstances. It might be technically insolvent, and like many, may carry on. They may take on a contract which, from all appearances, would have the potential of restoring that company to good health. Halfway through the contract he may find out that the company is incapable of carrying out the contract successfully, has underbid the job, and from that point on, under this bill, the agent—that is, the president or the officer of the company—might be personally responsible for any losses he suffers on account of that contract.

We have other points that we want to bring to your attention, in our more detailed brief. I would refer the committee to them.

The Chairman: I take it from what you have just stated that that would represent the point, shall we say, of possible penalty or liability for agents and directors, and you are objecting to the severity of them. Is that it?

Mr. Sigurdson: Yes. I am pointing to the fact that it does not seem to be that the courts might have an opportunity to take into account extenuating circumstances. They might simply have to levy a penalty as prescribed by the bill, apart from the quantum of the penalty. The fact that the penalty might have to be imposed is another objection.

The Chairman: One of the penalties, as I recall it, was that a director, who was a director when the company became bankrupt, would be deemed to be bankrupt.

Mr. Sigurdson: That is so.

The Chairman: Well, we had quite a discussion on that the other day with the departmental officials. We came to an understanding—I think that is a fair way of putting it—that there seemed to be, shall I call it, almost an absurdity in deeming someone to be a bankrupt who is not a bankrupt. There was agreement on this with the departmental officials. We thought that, instead of deeming a director to be a bankrupt, and all the penalties being imposed on him, there should be limitations or restrictions listed in the bill in relation to a director, who is a director of a bankrupt company, at the time it became bankrupt, and those restrictions could be applied, one or more of them, against such a person, limiting the period before he could accept the responsibility of directorship, and a lot of other restrictions. Would you approve of that as being the more appropriate way of dealing with that particular situation, rather than saying that such a director is deemed to be bankrupt?

Mr. Sigurdson: Yes, senator. I wholeheartedly agree.

The Chairman: All right, then. We have not reached a point of disagreement yet.

Mr. Biddell: Not yet.

Mr. Harold Poultney, Q.C., Member Bankruptcy and Insolvency Committee, Board of Trade of Metropolitan Toronto: Mr. Chairman, on behalf of the Board of Trade of Metropolitan Toronto, the only point I wish to make on this particular topic is with regard to the board's anxiety about the provisions in the bill which would permit an administrator to express an opinion, with the benefit of hindsight, about the conduct of an agent or director who might be attempting to salvage a company which was in financial difficulty. The Board is very concerned lest this field become open to abuse by the administrator, in that he could make a determination, as I point out, with benefit of hindsight, a lot easier than the gentleman who is on the firing line making the decisions. In addition to expressing their concern about this issue, they have asked me to indicate to you with respect to the points made by the CICA, that it agrees in general with those points.

The Chairman: What you are really pointing out is the weight that should be attached to the opinion. You are not saying that the administrator should not be permitted to express an opinion?

Mr. Poultney: No, senator, not that he should not be permitted to express an opinion. The suggestion is that there is great danger in an opinion having a certain weight if it is expressed with the benefit of hindsight, as you no doubt appreciate.

The Chairman: Well, there is great benefit from cross-examination, too.

Mr. Poultney: Yes.

The Chairman: We have to assume that some measurement has been intelligently made of the position of the administrator and his capacity to speak, and the value of what he says.

Senator Cook: I think it is a very good point, though, Mr. Chairman, because how often do you forget that the knowledge you have in November was not available last March? You tend to forget that. You judge what a fellow did four or five months ago, but with the benefit of the knowledge you have now. Your judgment gets clouded in that way. You did not know what you know now. Prices go up and down, for instance, and you tend to forget about that.

The Chairman: Yes. The administrator may express an opinion, but I do not think we can put a prohibition in the bill saying that the administrator is not a knowledgeable witness. I would find it difficult to take a position in support of that.

Mr. Zwaig: I think perhaps the administrator, in expressing his opinion, should refer to other interested parties, such as creditors. There should be creditor input into his findings, and into to his examination and investigation. There should be inspector input, also. Would that be acceptable to you, Mr. Poultney?

Mr. Poultney: Yes. I am just speaking to the general principle, and I think there might be acceptable mechanisms that could be worked out and that could be place in the act.

The Chairman: I just do not know how we would stipulate that all these people must be called as witnesses. After all, the director or agent whose position is in issue has some responsibilites to meet, and also has the opportunity to meet any allegations that might be made by the administrator. I do not know how we could put in the bill the stipulation that the administrator shall see ot it that the creditors and the debtor are called. Something must be left for the judgment of the people who are facing an issue, as to how they will meet it.

Mr. Biddell: Mr. Chairman, I quite agree with that, but this really bears on the matter that was being discussed here this morning. It was pointed out how, on so many occasions, when banks, particularly, who have floating security, take over all the assets of a company, the receiver will go in, representing the bank, and attempt to restore that company to good health. That is a pretty risky proposition. He will have to make decisions very quickly, otherwise the patient is going to die. He will have to take serious risks in a business way, and if those decisions turn out to be wrong, and the business does not prosper, we wanted to express a concern lest, looked at in the light of hindsight, it might appear as though he should have just closed the think up and forgotten it.

We would not want this bill to come out in such a fashion that those people who normally try to restore an ailing business are going to be inhibited from doing so.

Mr. Baird: Would not the words in clause 176, (1), "in his own interest or the interest of someone related to him", give the receiver sufficient protection? Because any steps the receiver took would not be in his personal interest, and it would not be in the interest of a person related to him, using the word "related" as a legal term defined by the act. Would that not be (a) saving protection?

Mr. Biddell: Well, as long as he is not related to the debenture holder, by definition, in this act, or that it is not held as a fact he was related because he was acting for that party, I do agree. We are getting into technicalities here, and I think perhaps we have laboured this point as much as we should. We are, however, very concerned that there

be no obstacles put in the way of bona fide attempts to save the business from bankruptcy and dissolution.

Mr. Baird: I think, with proper wording, we can avoid that situation.

The Chairman: Perhaps this will lead to a revision of the debenture and bond agreements, or whatever type of security it is by virtue of which a receiver moves in. There might be a clearer definition of the scope of this duties, etc.

Mr. Biddell: It could happen that way, but on the other hand, we fear that with the precise wording in clause 176, no matter what might be said in the security document that entitles him to go in, it will be overridden, and that looked at after the fact it will be decided that, if he made a wrong decision in helping to restore the company to health, he could be held to account.

Senator Cook: I do not think he would be held to account under this particular section.

The Chairman: I do not think a wrong decision, as it turns out ultimately, is the last word. It has to be a wrong decision which was in his own interest, or in the interest of someone related to him.

Senator Connolly: Do you want to relieve him from personal liability when he conducts himself as a prudent administrator should conduct himself? That is really what you are coming to.

The Chairman: I think the language might be a little happier, and perhaps, since our attention has been directed to it, we may try to find happier language.

Mr. Biddell: That is, I think, all we could really ask for, Mr. Chairman.

Now, going on, I would like to speak on the subject of commercial arrangements. These are what we have known under the present legislation as "proposals", which are an attempt to make a settlement in one form or another with the creditors of a company.

We have about ten points listed in our summary. Ther are only two or three of them that I want to speak to. This is one of the areas in this bill which we believe is a definite improvement over the existing act. There is now included here a provision under which a company that finds itself in difficulties, and wishes to work out a plan of re-organization, is given an opportunity to do so free from harrassment by its creditors, by enabling it to file this notice of intention, or plan of arrangement, and, with the filing of that notice, obtain a stay of proceedings against creditors who may attempt to move in and seize assets or put the company into bankruptcy; but we thought that the provision in the bill should go a little further, because presently, as we read it, the debtor itself—the director or the executive officer of a company—could apply for such a stay. We thought it would be appropriate that the only person who could apply for such a stay would be a licensed trustee, who had been consulted by that corporation and was in fact seized of the matter, and was getting on with developing a plan of re-organization. Failing that, we are concerned that some company, perhaps a private company, where the owner just wants some time to make off with the assets, would himself apply for the stay, obtain it, and have a period of time free from harrassment where he could do what he wanted to with the assets.

If any plan of arrangement is to go through, a licensed trustee has to be involved, in any event; so we felt that the only person who should be allowed to make such application—and he obviously should only make it with the concurrence of the debtor—should be a licensed trustee.

Mr. Baird: Clause 94(1) provides that the notice to be filed must include the name of a trustee who has agreed to act as trustee for the arrangement. Do you not feel that that is sufficient protection, Mr. Biddell?

Mr. Biddell: Perhaps that would be sufficient if there were a written consent of the trustee filed along with the notice; but, frankly our experience is that a trustee is essential in all of these matters, both from a practical and from a legal standpoint, and that it would be a worthwhile safeguard if he could be the only applicant.

Secondly, we thought that if a trustee is going to take on the responsibility, and acknowledges that he intends to do so, by filing such an application, then to some degree that trustee should take on the responsibilities of an interim receiver and have the responsibility to the creditors to protect the assets. We have suggested that the particular detailed role that he carries out as interim receiver in protecting those assets be set out in the court order that appoints him at that time, because in many types of business organizations it can be very expensive if you have to assume all of the responsibilities that the act ordinarily attributes to an interim receiver. So we think that the trustee should have the general responsibility to protect the company's assets, but he should not necessarily be obliged to take possession of every asset wherever it is and have the personal responsibility for safeguarding it. The court could look at the circumstances of each application and decide the extent of the responsibilities.

Mr. Baird: Would it be desirable to have a specific reference point to the court to give some guidance as to the court to give some guidance as to the powers that should be given to the interim receiver in these circumstances?

Mr. Biddell: I would expect that when the application is made, the court should require an affidavit from the trustee, and perhaps from the debtor, that would provide the information to enable the court to decide how far the interim receiver's duties should go in the intervening period.

The Chairman: How far it should go in safeguarding the asset?

Mr. Biddell: That is right, Mr. Chairman.

WE have two more points. With reference to subparagraph (h), one of the things the CICA and the Board of Trade of Metropolitan Toronto have urged in new legislation is that the report which the trustee is now required to give to the creditors at the first meeting of creditors and which details the extent to which the trustee has personally examined the financial position of the debtor, and which provides basic information which the creditors are entitled to, to enable them to determine whether or not they should approve the proposal—that report should in fact, rather than just be handed to those creditors at the meeting, be sent out in advance with the notice of the meeting and with the report. Most trustees do this in pactice now so that creditors can get the information they require and have an opportunity to study it and come to the meeting in a much more informed condition to deal with the matter expeditiously. The bill presently provides that that report has only to be presented at the first meeting. We think it should be sent out with the notice of the meeting. How-

ever, we suggest that it does not need to be sent to the very small creditors.

Mr. Baird: But what about timing? Would this not delay the meeting because of the fact that you would have to have the report ready by the time you sent the notice out?

Mr. Biddell: In my firm, and I can speak for quite a number of other firms, it is our invariable practice, and it has been for 25 years. And the CICA Committee which had on it trustees from right across Canada make this recommendation unanimous. There are times, particularly when you are dealing with a very complex matter, that you will need more than a ten-day period in which to develop a plan of reorganization, and our recommendations here propose that the trustee would have the right to go back to the court and ask for an extension of that time to develop that plan. Certainly, in those complex matters, if he could persuade the court that he should have more time, then that time would give him the opportunity to develop that report. We think this is most important because there have been in the past quite a number of cases where the trustee has done nothing more than take whatever proposal the debtor has handed to him, call the meeting of creditors and ask them to vote. But the creditors really had no worthwhile information.

Senator Connolly: This is a very sensible and practical suggestion, Mr. Chairman.

Mr. Baird: Are you satisfied with the time limits given under this bill, with the first meeting within 30 days and ten-days' notice of the meeting?

Mr. Biddell: Yes, I think those are acceptable.

I have just one more comment on the subject of commercial arrangements, and that is dealt with very briefly in the note on subparagraph (j), but we deal with it in greater detail. You will recall that there was some discussion this morning concerned with voting by classes, dividing the creditors into classes, and so on. I think it has been generally agreed that that clause has to be worked over and put into the form that everybody hoped it would be in when it came out. There has been a problem in drafting it. We, along with the Canadian Bar Association, have had discussions with the department and we believe that there is every intention of doing so. I refer to it now because one of the things that we really hoped to achieve in the new section dealing with commercial arrangements was to obtain a workable means of dealing with the great many insolvencies which we face in the construction industry. There are so many occasions on which a contractor or a developer will get into financial difficulties. If we had time and had the ability to hold at arm's length all those creditors who have individual rights under the mechanics' lien legislation of the province, where now we have no means of requiring the minority of such a group to be bound by the will of a majority, there would not be the same difficulté. That has been a serious deficiency in insolvency legislation up to the present time. I know that the department had hoped to remedy that in this bill although, unfortunately, it does not appear that this version of it has been successful, and this is one of the main reasons why we want to see this particular clause worked over so that that can be achieved. A little later in our summary, under the heading of "Mechanics' Liens", we suggest that the Minister of Justice might attempt to liaise with the attorneys general of the various provinces and, frankly, I wish now that we had not put that in, because it has been pointed out since that that might delay indefinitely this very worthwhile measure coming forward. We have since been convinced that this can be done federally to the extent that we need it done, so that we can get creditors together—that is, those who have a mechanics' lien right on the same piece of property and who differ only in the amount—put a plan of composition in front of them, give them all the facts and ask them to vote. Where the majority, as prescribed under the fact, dictate a course of action and where that plan is approved by the court, then the court can enforce it.

Senator Laird: In other words, you do not anticipate any constitutional problems here?

Mr. Biddell: Well, the solicitors with whom we have been discussing this and who, in turn, have discussed it with the departmental officials, believe it can be done. It is of such importance that we consider that it must be tried. No doubt there will be attempts on the part of certain individual lien holders to upset it when it first comes out, but those are the same people who now blackmail—and that is the word—all their confreres, and I mean exactly that because the only machinery available to us now in these situations is to draw up a special agreement and ask every one of those lien holders individually to execute it. You get them into an informal agreement, and they say, "Yes, go ahead," you spend a great deal of time putting it all together, you go all around the country getting signatures, and the last three or four fellows say, "Well, now you have done all that work, pay me off." That is exactly what happens now, so we need a situation where a responsible majority can bind an irresponsible minority.

Senator Laird: Mr. Baird, have you given any consideration to the constitutionality of the suggestion put forward by Mr. Biddell?

Mr. Baird: It is my opinion, senator, that it would be constitutionally within the power of the federal government, because when a mechanics' lien is filed in these circumstances the debtor would be insolvent and he would be unable to pay his debts generally as they fall due. So, even if there were no bankruptcy in fact, it would come under the "insolvency" head of the British North America Act, so it would be my opinion that it would be constitutionally valid.

Senator Connolly: Well, if you are going to do it, and if the department comes to the conclusion that under the Constitution it can, then I think it is better to have a second string to your bow and go to the various attorneys general to get provincial legislation on it too.

Mr. Baird: Then there would be no question as to its validity; that is correct. That would be very desirable, but practically speaking, very difficult.

Senator Connolly: But you will have many such instances.

Senator Cook: One does not have to wait on the other.

Mr. Baird: No; we could proceed in this act with the proposal of Mr. Biddell and also attempt to obtain the approval of the provinces.

Mr. Biddell: That is what we would like to see done, Mr. Chairman.

On the matter of conflict of interest, Mr. Poultney has a comment.

Mr. Poultney: Mr. Chairman, honourable senators, the position of the board and the question of conflict of interest is that it would be unduly restrictive of a practice which the board members and those it represents have found to be a very useful one. That is, where a trustee can act as a receiver, can represent adequately both the interests of the secured creditor and the receiver and, as a matter of fact, at great savings to both parties. It is very beneficial to both parties and it is very beneficial for the unsecured creditors in many cases to have the receiver appointed the trustee. The board feels that the practice which members have experienced has been and continues to be an acceptable one. They do not see any problem with this practice and they are concerned that there should be contained in the fact a definition of conflict of interest which would prohibit this practice which has gone on.

The Chairman: You may have struck a difficult point there. People have been struggling for years, even in government, to determine what is conflict of interest.

Senator Laird: Yes; we have a committee which sits time after time on that very proposition, the Standing Senate Committee on Legal and Constitutional Affairs.

Senator Connolly: I think, Mr. Chairman, it is very interesting to read in the summary, Conflict of Interest:

> We recommend:
>
> (a) That the question of whether or not a conflict of interest exists should be determined by the related professional bodies under their respective rules of conduct, and not be legislated by this Act.

Although it is a little outside the purview of our discussion now, could I ask: In The Canadian Institute of Chartered Accountants, a professional body, I take it that you have a disciplinary committee and a committee which will inquire into and make findings upon conflicts of interest within the profession.

Mr. Biddell: We do very much, in that we have very stringent rules of professional conduct in the code of conduct of each provincial institute and in the CICA itself. We have gone on in our proposal to ask that the Superintendent of Bankruptcy's office assist those professional conduct committees by reporting to them any transgressions on the part of licensed trustees, whether they involve conflict of interest, or anything else, because our own disciplinary bodies desire to do their job.

Senator Connolly: I suppose it is a fair comment to say that problems of conflict of interest, not only in your profession but within most of the professions, and in this case yours particularly, are problems that you can describe as "old hat." You have been dealing with such for years and have some expertise in how to handle them.

Mr. Biddell: I think that is fair. At this point might I just refer you to clause 30, which was discussed this morning? Here the bankers' representatives were talking about a bank's receiver having gone in and taken possession of the assets and whether he should become trustee in bankruptcy. The bankers expressed the opinion that this works out very well for all concerned. They were concerned with the words "except on such conditions as may be prescribed," and we have had discussions with the department, which has shown us draft regulations that relate to this clause. They are regulations that we all agreed on a long time ago and have, in fact, been following and which are set out in rules of professional conduct. So that, although this bill may appear to prevent or restrict the trustee acting for a secured creditor, that is not the intention when the regulations are considered.

However, we recommend that, rather than have this section 30 included in the act, the regulations which back it up go in as a section of the act, so that it is perfectly clear what is intended here, because these regulations make sense. The most important aspect of it is that they require the trustee, if he is going to act as trustee in bankruptcy in addition to acting as agent of the secured creditors, to obtain and turn over to a completely independent solicitor the security documents upon which those secured creditors are relying. He must get a clear opinion and report that to the inspectors, and the secured creditors are entitled to have possession of those assets, or whatever is called for.

Finally, he is obligated to report to the insepectors and the creditors as to all of his dealings with those assets and the remuneration, whatever the arrangement is that he has with the secured creditor for whom he may be acting. With those as safeguards, certainly we are satisfied. We have always followed those, and I am satisfied that the authors of this bill also are prepared to see the practice continued, which, as Mr. Poultney has pointed out, has been going on for a long time.

Senator Cook: There is no difference in substance, only a difference of method.

Mr. Biddell: That is right.

Senator Laird: Mr. Biddell, you have mentioned the regulatory body for the chartered accountants. Not every licensed trustee is necessarily a chartered accountant.

Mr. Biddell: Almost; there are very few left who are not chartered accountants. I can only think of one in Metropolitan Toronto, but there may be others.

Senator Laird: I can think of others outside Toronto. There is an outfit in Ontario known as the Ontario Association of Trustees in Bankruptcy. Are you a member?

Mr. Biddell: Well, I will not dwell on that, except to say that that organization had a charter for along time. It was not active until such time as those who held its charter, its organizers, agreed that it would effectively become a committee of the Ontario Institute of Chartered Accountants. Then we all joined.

Senator Laird: Are they subject to your regulatory rules?

Mr. Biddell: Yes, completely. There are a couple of points that Mr. Sigurdson would like to deal with under the general heading of "No asset bankruptcies."

Mr. Sigurdson: We perceive that in the new legislation the intention of the Superintendent of Bankruptcy is to take on the duties of the professional trustees. We think that they are embarking on a course the consequences of which we find very difficult to assess. However, we think that we should be concerned about it. In order to administer bankruptices of corporation, we who are in public practice need a large staff to draw upon from our conventional staff. We fail to see how the Superintendent could do this work without having a pool of people to draw upon to carry out these functions. The fluctuations of work are unavoidable and we just cannot see but that a great increase in the staff of the office of the Superintendent would be necessary.

Senator Cook: That is an interesting observation, because in relation to that and to your consumer-debtor arrangements in which you make the same point, we have been told that it is hoped, anyhow, to administer the act with exactly the same staff. Is that more or less right? In other words, it is hoped there will not be any more manpower used in the administration of the act than is now being used.

Mr. Sigurdson: I do not see how that is possible. If we found ourselves landed with five or ten new bankruptcies, we would have to take on new staff so we would have to have staff to draw upon.

There is another element to this thought that concerns us a little more deeply. Presently there is a trustee in bankruptcy. He is accountable to three or four people. He is accountable to the Superintendent of Bankruptcy. The superintendent audits his acounts and he audits his operations. He is accountable to the registrar, who examines his accounts and taxes them. He is accountabl to the creditors, through the inspectors that they elect. The inspectors monitor the trustee's actions and examine his acts and deal with them.

It is a very neat system that has developed through the years, a system of checks and balances, which would be forever lost. Where the superintendent does his own trustee work, he would be his own registrar, he would be his own inspector, he would tax his own account, do his own work, and we think that is wrong.

Senator Laird: So do we.

Mr. Sigurdson: Pardon me, sir?

Senator Laird: So do we.

Mr. Sigurdson: Those are my observations

Mr. Baird: Do you consider these comments to apply to the consumer-debtor arrangements as well? Do you think the private trustee should handle the consumer-debtor arrangements?

Mr. Sigurdson: It is the view of our committee that even that should be done by engaging, where necessary, people in the public field to do that work. It may not be the consensus of our particular, committee however.

The Chairman: Who pays them?

Mr. Sigurdson: They would have to be paid by the government, if it is welfare type work they are doing.

The Chairman: You know the old saying about the man who pays the shot very often likes to be able to call the shot too.

Mr. Biddell, have you any comments on that?

Mr. Biddell: On that one there is a division of opinion, I must confess, in the profession. There are a great many trustees whose practice consists almost solely of handling personal bankruptcies; there are others who do not do very much work of that nature.

I think the great majority of the profession is certainly in favour of the bankruptcy of individuals being handled by professional trustees in the private sector. I do not think there is the same support among the profession for the private sector trustees being involved in the consumer arrangements. It may be we fear that if the two larger provinces, Quebec and Ontario, adopt the consumer arrangement provisions, there will be a great many people taking advantage of them.

There would be a definite advantage in using private trustees in the remote areas, rather than setting up a permanent staff of government employees throughout those wide areas. That might make a proper set of circcumstances in which the professionals might be involved.

Personally, I would think that in the major centres, where this is perhaps more social legislation than insolvency legislation, if the government decides that is what do do, it should be handled by government staff.

Mr. Baird: With respect to personal bankruptcy, Mr. Biddell, where there are no assets, at the present time a private trustee's charges are approximately $500 before he will handle a personal bankruptcy. What would the situation be for the man who could not afford the fee of the private trustee? Have you any suggestions in that regard?

Mr. Biddell: Yes. The suggestion of our committee—this came forward from the committees that had been set up by every province that had a bankruptcy committee of its own studying this bill—was that these should all be handled by professional trustees. In the great majority of cases there is, if nothing else, an income tax refund. Quite frankly, this is what finances the professional trustee's fee even in the so-called "no asset" bankruptcy; where the debtor has nothing else, he usually has an income tax refund. That is the main source of fee of those trustees. There will be some cases where that will not produce enough to cover the cost of the bankruptcy administration by the professional trustee.

We propose, in this brief, that a tariff be set. This would not be a very large amount. This might involve the government in perhaps a maximum of $150 or $200 in those cases where there were not enough assets, one way or the other, to finance the bankruptcy.

Mr. Zwaig: Mr. Biddell, as you are no doubt aware, under certain circumstances representatives of the office of the Superintendent of Bankruptcy presently administer "no asset" bankruptcies. Would you propose that that situation continue as it is now? If "yes," what objection would you have to extending it beyond the present limits? I quite frankly take objection to the fact that we have a "no asset" bankruptcy, yet the individual has to pay a trustee a professional fee to go bankrupt.

Mr. Biddell: Well, we are aware that that is the case. There has to be the safety valve of bankruptcy for a considerable number of people. The CICA takes the position that those bankruptcies should only be handled by professional trustees in the private sector and that the government should set a tariff of fees for those situations, and where the assets avaialable to the professional trustee do not meet that tariff, that then the government provide the deficiency.

Senator Laird: It would be far cheaper than creating a whole new bureaucracy with a lot of offices all over Canada, would it not?

Mr. Biddell: We believe that to be the case because we think that particularly once the creditors' arrangement provision comes in, it becomes more widely known. It is becoming more widely known every day that you can get rid of your debts just by calling up that particular floor, going to see that particular man and paying him $50 and

setting off the hook. As that becomes more widely known, and it surely will be, there will be a much greater demand for that service. It will involve setting up a much wider permanent group of government employees than exists today.

Senator Laird: Correct.

Mr. Baird: When Mr. Howard attended before this committee, he suggested this might result in a solicitation for fees. That would be a very undesirable result. Would you comment on that?

Mr. Biddell: Well, with respect to Mr. Howard—and I have a great deal of respect for his ability in the industry—I do not think that is so. Presently anyone is free to go to a professional trustee. If, for some reason or another, he does not want to get involved with a government servant, he is free to go to a professional trustee now. I do not see why there is any greater danger of solicitation of people to go bankrupt. If you leave this strictly in the private sector, as we are proposing.

Senator Cook: He can go to the professional trustee now, but there is no one to pick up the deficit.

Mr. Biddell: That is right.

Senator Cook: So, there is no sense in soliciting business if you cannot get paid.

Mr. Biddell: That is right. Specifically what we are recommending is that a debtor has the right to go to a professional trustee or he can go to the administrator, or whoever the appropriate person would be in the civil service hierarchy; and if he goes there and gets a certificate from that man, entitling him to go into bankruptcy, then he would take that certificate to a professional trustee and that would entitle the professional trustee to come back and get the deficiency in his fees up to a stated tariff.

A professional trustee could not, just willy-nilly, select people and encourage them to go bankrupt and then go to the government to get paid. The government would have the first call. Only where the government had approved the bankruptcy in the first place would the professional trustee have the right to come and ask that some part of his costs be defrayed by government.

Mr. Baird: Would you envisage a list, and an allocation of cases based on a predetermined list by the administrator, or would the debtor be entitled to go to a trustee of his own choosing?

Mr. Biddell: It would be perfectly acceptable to the profession if the administrator kept a list of those professional trustees who were prepared to take on this sort of work. He could allocate debtors as they came to him, to whichever trustee on that list he chose. That would be entirely acceptable.

Mr. Baird: That might avoid any suggestion of solicitation.

Mr. Biddell: I think so.

The Chairman: You next point, please.

Mr. Biddell: I would like to speak to the matter under the heading of "Realization of profit." We should have fleshed this out in a little more detail in our narrative, but I particularly refer to this problem. I do not have many quarrels with my friends in the Bankruptcy Branch, but there is a quarrel of long standing that we have had. I think it is endorsed by every professional trustee.

In the regulations, which set out the detailed procedures a trustee must follow in administering the act, the superintendent is wont to set down detailed procedures as to exactly what we must do. Those are ordinarily done by consultation, and they work very well; but there is one there that rankles, and which, in the opinion of the profession, makes absolutely no sense. That is that there is a bulletin that describes what trustees must do when they put assets up for sale by tender, and this is the normal procedure that a trustee follows when he intends to sell assets that are entrusted to him. Sometimes he will put them out for auction, but in the great majority of cases he will call for sealed tenders on the assets. Of course, that call will be advertised, conditions of sale will be set out, and at an appointed time those tenders are opened. They are always opened in front of the inspectors. There is a detailed set of procedures for keeping a record of this, and so on, and all of these matters are set out in the regulations that the superintendent's office has laid down.

There is, however, an additional one, and that says that the superintendent has decreed by regulation, that the trustees must invite and permit all those who have submitted a tender to be present at the opening of tenders.

Senators, that is a disaster, because it only plays into the hands of people who make their living by buying distressed merchandise. I have no objection to those people—obviously, it is a legitimate business and we need them; but what happens is that each of the tenderers submits a tender in which he puts a condition that he knows the trustee could not accept under any circumstances. Then he attends and waits to see who has bid, and how much. The high bidder looks to see how much he has left on the table, and what the difference is between his bid and the next highest bid. The price of getting that unacceptable condition out of his tender is that he lowers his price to a nominal sum above the next highest bid, and it works every time.

The only way we have been able to deal with this over the years is by opening those tenders in private, and threatening to hit right over the head any of the inspectors who are in the room if they leak to the highest bidder what the next highest bid was; because the trustee then has to get hold of him and jawbone him into taking that condition out without paying too much for it.

I remember one circumstance where we went until three o'clock in the morning, and we saved nearly three-quarters of a million dollars on a tender which would not have been available to us at all if we had followed the requirements and had those people been present when these tenders were opened.

We have suggested that if any official of the bankruptcy office wishes to attend at the opening of tenders, we are delighted to have him there if there is any concern that there is any liaison or anything improper between the trustee and potential bidders; but the regulation that is presently on the books, and that we quite frankly evade as well as avoid, as we must, in the interests of creditors, should be removed.

Mr. Baird: It has been my experience that if the person who submits the tender is a company with no assets, they will leave their deposit on the table rather than complete the sale if the purchase price is greatly in excess of the next highest bid.

Mr. Biddell: That happens, too. When that information gets out, as to how much the highest bidder left on the table, you are finished. The creditors are severely prejudiced. This has not worried us too much, because in the important cases we are also selling as receivers for secured creditors, so it is a joint sale and we therefore do not follow the rules; but now we are having receiverships coming under this bill, and we would have no legal way of avoiding the rule, so the rule has to be changed.

The Chairman: Does that bring us to receivers now?

Mr. Biddell: I think it does, Mr. Chairman.

Mr. Sigurdson: I only have two points about this. One is with regard to clause 343(3), which empowers the court to amend or abrogate an agreement. It seems that it is the intention that it will only amend or abrogate it to the extent necessary to assist the receiver in providing court-required information; but it is not clear that it is entirely that, and I would like to see that amended. Possibly Mr. Baird might have a view on that.

Mr. Baird: There is no question but that this is a serious result with respect to civil contracts entered into between the parties. It gives the court the power to complete the change agreement negotiated between the parties. There is a possibility that that could give rise to constitutional problems.

Mr. Sigurdson: I think the intent of the legislators should be determined and, if it is their intention only to assist receivers, that should be said.

The other point I have is that throughout the secured creditor position—and I think that will be dealt with later—there is a possibility of thwarting secured creditors where receivers are involved for a longer period of time than in a bankruptcy.

The only point we make in our more detailed report is that what should be done is that the secured creditors should be dealt with in the same manner as is provided for in the secured creditors sections.

Mr. Biddell: We are going to deal with those in a detailed manner in a few moments, Mr. Chairman.

Mr. Sigurdson: Those are the only points I wish to comment on orally.

The Chairman: I suppose the question on abrogating a contract, where there is any problem of validity involved, is, would the things that were done be incidental to the main purpose of the legislation?

Mr. Biddell: I think that is right, Mr. Chairman. We are not addressing ourselves to the problem as to whether or not the secured creditor had a valid security document. He has, or he loses his security. What we are concerned with is the introduction here, I think for the first time in Canadian insolvency legislation, of the right of the court to interfere in the contract between the secured creditor and the debtor. That is the situation that prevails in spades in the United States. I have had quite a good deal of experience in major receiverships in the United States, and there the court turns to the trustee and says, "You take all the assets. It does not matter what the security contracts say. We will decide what is going to be done with them." In these circumstances a creditor who has loaned money, or a group of bondholders who have invested their money in that fashion, find that the rights on which they are relying are effectively taken away from them. Certainly, when the assets are finally sold they will have first priority, but they do not have the right to determine when, or how, those assets are going to be sold, except through making representations to the court, and it is the court that decides.

Traditionally, in Canada, we have had a much more effective system that has stood the test of time, and that is that a debtor is entitled to enter into a contract between himself and the person who loans, and that contract stands, notwithstanding anything in the Bankruptcy Act, provided, of course, it is a valid contract and has been validly entered into.

This, we fear, is the thin edge of the wedge of the introduction of the United States system into Canada. The United States system, we think, works very much to the detriment of the industry, because it puts secured lenders in a much more difficult position. They cannot be expected to advance funds as readily as they have been prepared to do in Canada, and we are very concerned that this clause be changed.

The Chairman: What you are saying is that this provision could well make it more difficult for businesses to finance.

Mr. Biddell: Yes, indeed.

Senator Lang: I think we have modified section 88 under the Bank Act already, have we not? The same principle has been recognized in the Bank Act. Secured creditors are not as secure as they previously thought they were.

The Chairman: You mean, they do not have as much as they thought they had.

Senator Connolly: At least, though, it was done by legislation, and everybody knows about it. It seems to me that in a case like this it is going to be a decision of a judge, and it might or might not happen. It is a discretionary power that the judge is given. I am inclined to think that Mr. Biddell is completely right about this. It is a complete departure from a principle that has been established in the Bankruptcy Act. It is the validity of a contract entered into long before there was bankruptcy or any thought of it that now can be perhaps abrogated. It does not seem to me that this is a sound proposition.

The Chairman: Do you think there should be a time limit in which such authority might exist?

Senator Connolly: Perhaps that is so, Mr. Chairman, but I would think that the ordinary rules covering fraudulent preferences, and matters of that kind that are already in the bankruptcy law, are a protection. But why should I be giving an opinion? We have the experts here. Ask Mr. Biddell.

Senator Cook: It does not seem to me to be right that the secured creditor does not get anything more if the business prospers. Why should he be penalized if the business does not prosper? He makes his agreement and he has some security.

The Chairman: Well, the most he can get is what the contract calls for. In fact, to put it another way, the most he can get is what the assets will produce. As a secured creditor he has security, but even though his security calls for $100 for a $100 piece of paper, if the assets do not produce that, then he does not get it.

Senator Barrow: Mr. Biddell, what would be the reason for the American procedure?

Mr. Biddell: It has just grown up through practice there, senator. Their procedure is different, in that we have always said that the secured creditor is entitled to what his contract entitles him to. Down there they set aside the rights of the secured creditor under his contract and the court takes all of the assets in and takes a good look at them. They do not take away the secured creditor's priority if there is a liquidation and the proceeds are to be distributed. Insofar as the secured creditor's right to determine what he is going to do with his assets is concerned, in fact, he must deal with them in a proper manner but he is the one who determines how they are going to be disposed of and when. The court can, on representation and for good reason, provide delays and so on, and that has always been possible in Canada although seldom resorted to. We recognize this particular clause as in every instance leaving open the prospect that the debtor or some creditor can go to the court and say, "Here, notwithstanding the fact that the bank or that group of bondholders have a first charge on these assets, we think the court should interfere with that contract and say this . . .". It is a complete departure, and we think it would have a most serious effect.

Senator Connolly: Can you tell us what the provisions are in the British law?

Mr. Biddell: I cannot speak with authority on that, senator. Mr. Baird may have some information on it.

Mr. Baird: I am sorry, senator; I cannot do so either.

Senator Connolly: I would think that ours would be more likely to be based on theirs than on the American.

Mr. Biddell: I am certain it is. I have dealt with it in the Bahamas and I know what is the case down there, but I have never had any personal experience in England. I would be very much surprised if our procedures were not based on the U.K. procedures.

Senator Lang: Is there not a tendency on the part of the secured creditor to dispose of the assets as fast as he can and at any price that will meet his security, notwithstanding that by more lengthy procedures he may realize more to the benefit of the unsecured creditor?

Mr. Biddell: No, in my experience, senator, that is not the case. Here I think I speak for the other professionals as well, and we have had, perhaps, amongst us, the widest experience in Canada. The people we are primarily dealing with and who ordinarily hold the major security are the chartered banks, and then the trust companies who are acting as trustees for bond holders. There are some small or large finance companies, but mostly their security is limited to specific assets like trucks or other specific pieces of equipment. Those people who have the floating charge security, for all practical purposes, are the banks, groups of bond holders and certain government departments such as the Ontario Development Corporation or the General Adjustment Assistance Board here. Their practice is almost invariably to give any reasonable amount of time to see whether or not that business can be reorganized. Quite frankly, it usually depends on the inclination and the energy of the receiver as to whether or not there will be an early attempt to liquidate or whether there will be an attempt to try to reorganize the business. I think the great majority of professional receivers make a reputation for themselves if they can reorganize the business, and that is ordinarily their inclination. Their masters, the banks, the trust companies and the government lending agencies, I am happy to say, go along with that to a very great extent.

The next matter we wanted to comment on, Mr. Chairman, is in connection with the registrar. The bill proposes that the office of registrar that has been in existence under bankruptcy administration for many years be eliminated, that part of his function be taken over by the proposed new functionary, the administrator, and that those that are purely judicial be taken over by other officers of the provincial courts. We have discussed this matter in great detail in the CICA committee, and we have discussed it with members of the Bar and with members of the Board of Trade, and we are greatly concerned that the office of registrar be maintained. A registrar serves a most important function, particularly in those circumstances where we are attempting to reorganize a company, and where we have to go in and, at the drop of a hat, without having to ask for an appointment and without having to serve people, obtain rulings from the court. Because the registrar's orders have the power of a judge, an interim receiver or a receiver is enabled to borrow money to protect the assets, to enter into contracts, to sell certain sections of the business that need to be sold as a going concern—because if you cannot sell it quickly, then you are not going to be able to sell it as a going concern—in the interests of enhancing the salvage and, it is to be hoped, leaving a viable surviving company. We greatly fear that if this office is abolished and we have to go through normal court channels to obtain approval for those transactions for which, if we do not obtain an approval almost immediately, there is no point in going at all, the opportunities that have proved very valuable in reorganizing companies and averting a bankruptcy liquidation with the consequences of lost jobs and so forth will largely disappear. So we feel that registrars have served a very useful function, that registrars should be maintained as part of the court system, and that it would be a very regressive step so far as the Canadian economy is concerned if this administrative function were changed.

Senator Connolly: Do you say that because the registrar has been there for a long time, knows the jurisprudence and knows the act and is a specialist, and not because he has any judicial capacity but simply because of his knowledge and expertise in the field? Is that why you say that?

Mr. Biddell: No, the judicial function is most important because there are a number of things that a trustee or an interim receiver cannot do without approval of the court, and the registrar is the court under those circumstances, and one is able to walk up to the registrar—you do not have to have an appointment—and go into his office with an affidavit and you have to make a case for what you want to do. If he decides that somebody else should be served, then he will certainly make that decision. But in the great majority of those applications he deals with the situation in a summary way and on an *ex parte* basis, and you can get on and do what has to be done, because you are dealing with a business that is just about to expire. If you do not have the opportunity for quick court approval, then the major opportunity and the major purpose of what you are trying to do will in a great many cases be lost.

Senator Connolly: I think, Mr. Chairman, that the evidence we have just had confirms what Senator Laird said here about a month ago on this precise point.

The Chairman: I am sorry we were so long in confirming the point he made.

Senator Connolly: I suggest that this is very clear evidence from a man who has done it. This, I think, is one of the major problems we have with this act because, as I understand it, they want to abolish the office of registrar and substitute a government functionary.

The Chairman: Well, Senator Connolly, as you will recall, the departmental officers were here the other day and they went so far as to say, "Well, do what you will with the registrar and the particular judge who is assigned by the Chief Justice to carry out the duties in a particular province." So it is really up to us; they bump the burden. That is correct, Mr. Baird, is it not?

Mr. Baird: Yes.

The Chairman: They say, "If you want the registrar, put him in." So all the witnesses are in favour of doing what you think should be done.

Mr. Biddell: That is correct, and I would like to speak for the Board of Trade. I think I should at this point, because Mr. Poultney was one of our more valued registrars. The Board of Trade unanimously supports this recommendation.

I would now like to deal, Mr. Chairman, with certain aspects of the subject of secured creditors. There was some discussion this morning on the subject of restriction of secured creditors, where this bill introduces quite a number of time delays for the purpose, basically, of giving a trustee in bankruptcy representing the unsecured creditors an opportunity to assess his position and determine whether basically he will redeem that asset rather than let the secured creditor have it or sell it out.

The CICA committee and all the provincial chartered accountants' committees which were studying this bill have unanimously recommended that the time delays proposed in the bill are far too long. These are the people who are the professional trustees who the sections in this bill are ostensibly designed to assist. We are saying that we do not need that degree of assistance. We have proposed in section 26 of the CICA brief that those delays to give the trustee an opportunity to assess his position be materially shortened, that they be reduced to 10 days only and that insofar as concerns certain types of security, there need be no delay at all.

The approach that we have taken is that there are three basic types of security. Perhaps the most important ones to which the banks ordinarily look are the accounts receivable. We see it as a regressive step to limit in any way a bank or any other assignee of accounts receivable from realizing on those accounts. After all, he is not going to do the business any harm; this business is in bankruptcy and no harm will be done through the bank notifying the debtors and asking that the amounts be paid directly to it. It is important that that process be started without delay; it brings in money; it gets it at an early date, before those debtors start to figure out how they can avoid paying, which is what every debtor does every time he sees there is an insolvency. So we think it would be a regressive step to limit in any way an assignee's rights to realize on his accounts receivable secured.

The second major element of security is ordinarily the inventory. The group that ordinarily has the inventory is the bank, either under section 88 or by way of a floating charge. We suggest here that in this 10-day delay period the bank be entitled to possession of its security, but only be entitled to realize on it in the ordinary course of business, that it not be entitled to make bulk sales.

The Chairman: Or a fire sale?

Mr. Biddell: Or a fire sale. Also, that as long as it is carried on in the ordinary course of business—and, I may say, this is what almost invariably happens—the unsecured creditors and the trustee in bankruptcy representing them are in no way prejudiced. He has this period of time to determine whether there is an opportunity for a "going-concern" sale of the business. If he requires additional time, certainly it will be in the interests of the secured creditor that there be a "going-concern" sale. So very seldom is it difficult to negotiate for a further delay in a complete fire sale if there appears to be a reasonable prospect that a better result can ensue. We really do not think that there is a need for the 30-day and other detailed delays which are set out in the bill. We think that 10 days is sufficient.

We have said that with respect to the other major assets, the plant and the equipment, that it can. While the secured creditor should be entitled to possession, he should not be entitled to realize all these assets during that period. In our narrative we have described how there should, in addition, be the right to the trustee in bankruptcy to use those assets during that period, provided he makes a reasonable payment to the secured creditor for the period of use.

We set that out in detail and I will not labour it here orally. However, basically the plan would be that if it calls for monthly payments, the trustee should be required to make one monthly payment, and have the use of the equipment to carry on contracts, complete inventory, or whatever is required. He should be in the position where the secured creditor can tell him to pay all the arrears or he will not be allowed to move a stick of it. That is our basic recommendation. We have discussed it with representatives of the banks and others, and think that it will be acceptable to the lending community.

The Chairman: This takes care of the work-in-progress item?

Mr. Biddell: Yes, indeed it does.

Mr. Poultney: Mr. Chairman, on behalf of the Board of Trade, I can say that our committee has examined the recommendations of the CICA and heartily endorse them all, with the one exception of clause 161. They are not prepared at this time to express any opinion with respect to the recommendation of the CICA on clause 161, which deals with revolving credit.

Mr. Biddell: I think, Mr. Poultney, that is only because the Board of Trade did not get to it; it is not that they are expressing any dissent.

Mr. Poultney: That is right.

Mr. Baird: We have had a problem understanding clause 161.

Mr. Poultney: That is right; that is one of the reasons we are not prepared to express an opinion.

The Chairman: Well, it is pretty hard to have an opinion if you do not know what it is all about. Are you in that category, Mr. Biddell?

Mr. Biddell: Well, you can see that we recommended that it be deleted.

Senator Laird: Mr. Chairman, could I ask Mr. Poultney a follow-up on his observation? You probably heard this morning the topic on which I keep harping, that we do not need a whole new act, but can take the existing legislation and make amendments. Did your Board of Trade committee make any recommendation in that respect?

Mr. Poultney: No, sir, we dealt only with the whole proposed act.

Senator Laird: And you are accepting it as a proposition that cannot be changed, is that it?

Mr. Poultney: In my opinion, sir, as a piece of legislation presented for our comment.

Senator Laird: As a lawyer, would you agree that it would be possible to effect the reforms which appear to be desirable and the improvements such as those mentioned by Mr. Biddell, commercial arrangements, by simply amending the existing act?

Mr. Poultney: Speaking not on behalf of the Board of Trade but, since you addressed your question to me personally, I think that it would be impossible to place some of the concepts which are introduced in the proposed bill in one old act and end up with a viable whole.

Senator Laird: So you think we are stuck with bringing in a completely new act, but I presume, as you said, to go along with such suggestions as leaving the registrar's jurisdiction as is and not having any civil servant, such as an administrator substituting for the registrar in so many respects, as is proposed in this bill?

Mr. Poultney: Both acts could stand substantial amendment, the existing and the proposed legislation, sir; that is all I can say in answer to your question.

Senator Laird: You see, Senator Connolly recently made the observation that if it is a complete change in concept, as appears currently to be the case with this bill, then all the jurisprudence in bankruptcy, based on the existing act, just more or less goes by the board.

Mr. Poultney: I concur in that observation.

Senator Laird: Is that not a handicap?

Mr. Poultney: It will be a handicap; it may, on the other hand, be a boon to those who practise in the field.

Senator Laird: No, we are not here to help the lawyers out; we are endeavouring to do our best by the public.

Mr. Poultney: I agree with you, sir; I am just presenting an observation.

Mr. Biddell: I think I might just add to that observation that there is another body that has been created, the Anti-Inflation Board, so I guess they will see that lawyers do not make too much capital out of this.

Mr. Sigurdson: I would like to comment on your remarks, sir. Some of our members wholeheartedly agree with you. We are a group of ten, in our committee, and of the ten there are some that felt the only way to deal with this was to amend the whole act. We do not all agree with it, but some of us do.

Senator Laird: That is very interesting.

Mr. Poultney: Mr. Chairman, I would like to deal, if I may, with the provisions of the act on wage-earning priorities. The board, indeed, the CICA feel that the provisions of the act would require that all amounts owing to wage and salary earners by a bankrupty company, including separation pay under provision statutes, would be a prior claim on all the assets of the bankrupt. The claim would rank even ahead of the security interest in the assets, which the bankrupt may have pledged to lenders or others. The board has been particularly concerned about the provisions because of the effect which it believes they could have on the businesses to obtain financing, and the potential impact on directors and officers of the bankrupt corporation.

In the CICA brief, exhibit 30, they have dealt extensively with the problems that they foresee in the specific cases.

The Chairman: May I tell you "the state of the nation" on that point?

Mr. Poultney: Yes.

The Chairman: Mr. Howard, and the others, who appeared from the department the other day quite voluntarily made the statement that they had studied the systems in France and in England where the statute is in Parliament and there is the contemplation of a plan for Germany. They had now come to the conclusion, regarding the provision that they had made for this wage priority or whatever the form is that they have in the bill, that this was the wrong approach. In other words, they said it is up to us—that is, to this committee—to suggest what is the right approach. So, really what we are looking for from you are some suggestions. Forgetting about priorities, prior security and everything else in connection with the wages, how do we deal with it?

Mr. Poultney: Mr. Chairman, briefly, we have what we consider to be some positive suggestions as to some reform. Both the CICA and the board recommend the establishment of a fund, from which the unpaid wages of employees of bankrupts could be paid. On wages, we agree with the amount fixed as a prior preferential claim of $2,000. We object to the inclusion of severance pay as an admissible claim, for the reasons we outlined in detail in the brief. We believe that the directors should not be liable for unpaid wages, except where they have acted in a fraudulent manner. We do not feel that the wage earners should have priority over the claims of secured creditors. That is the second part of the recommendation, that there be a fund established.

These recommendations are set out in greater detail in exhibit 30, page 7, but I have just given a capsulized form.

The Chairman: While this is a recital, or may be one article of your faith, in connection with this bill, what do we do? Do we make a levy or have a fund to which the employer and the employee makes a contribution? We have been told the cost of it, in the opinion of the departmental officials, would be very small. I think they said 10 cents.

Senator Macnaughton: Ten cents a head.

The Chairman: I do not know whether it was 10 cents a day, 10 cents a week or what.

Mr. Zwaig: Ten cents per week per employee would produce $40 million annually.

Mr. Poultney: The problem is, sir, that I do not think we know exactly what we are dealing with. If severance pay is included, it makes a substantial difference to what the value of the fund must be.

The Chairman: Let us assume we stay with actual wages.

Mr. Poultney: If severance pay is excluded, the figures which the representatives of the department came up with are probably realistic.

The Chairman: You have to keep in mind that the departmental officials said that, based on their experience, they were allowing that the moment you set up a system to take care of the situation, to assure workers the payment of arrears of wages, there would be more claims; the claims would increase substantially. That was the experience in France.

Mr. Poultney: That is true, Mr. Chairman, and there is no good statistical data on the total amount of wage claims now in bankrupt estates.

The Chairman: The departmental officials did say that a levy of 10 cents, on the department's estimates, would produce a fund of $40 million a year.

Mr. Biddell: Mr. Chairman, I have had some discussions with the departmental officials and others on this subject, and the CICA committee is very strongly of the opinion that a fund is the only proper solution. If severance pay is to be included, then it would probably take a fund of $30 million or $40 million a year; if severance pay is not to be included, I think a fund of $5 million a year would be ample.

Whether severance pay is going to be included is a matter for the government to decide. I would just like to leave one particular point on the record in this regard, and that is that I am concerned, if there is going to be available to the employee of any company that goes bankrupt the amount of severance pay that is provided, for instance, under the legislation of the Province of Ontario, that a union could decide to bury the company. If a company's employees are on strike and the company is not in an economic position to meet the demands of the union, the union could very well take the position that since its members would get a couple of thousand dollars each from this fund and could then go and work for some other company, it might as well bury the company.

If severance pay is to be the right of every employee where a company goes bankrupt, then I think the whole matter has to be looked at very carefully. Such a step would put a powerful weapon into the hands of the employees, a weapon that should be subject to some restraining influence.

I am not against the idea of severance pay, but when you consider that unemployment insurance benefits are available rather quickly today and the employee, in addition, would get his wage arrears and vacation pay as well as severance pay, then he or she would get a pretty nice package. I am concerned that if the package is made too generous, it would be open to abuse.

The Chairman: If there are no further questions on that, we will move on to the next item.

Mr. Baird: I have one question for Mr. Poultney on his comment that directors would not be liable for unpaid wages except in cases of fraud. Under the Ontario Business Corporations Act there is provision making directors liable for unpaid wages, and there is a similar provision incorporated into the Canada Business Corporations Act. How would you reconcile the existing provisions with this recommendation, Mr. Poultney?

Mr. Biddell: If I may speak to that, Mr. Chairman, I have had some discussions with the departmental officials and others on this subject, and while it is perfectly true that for years there has been in each of the corporations acts provision making directors personally liable for unpaid wages of employees, those provisions have been very seldom resorted to, the reasons being, first of all, that the employees had to sue for wage arrears and, secondly, and more importantly, that employees are not sent home without their pay.

In my experience in receivership work over the last 25 years, I have never seen an instance where, if there were any assets at all, the employees did not get the benefit of the assets first. In the majority of cases, the bank has first claim on the assets, but under section 88 of the Bank Act the bank is obligated to pay the outstanding wages. Even in those cases where section 88 does not apply, it has been the practice of the banks to see that the employees received their wage arrears, and the major finance companies do the same thing.

I have heard of cases where what does not hold true, but those cases would be very much in the minority. If we change the act as proposed in this bill and where, by law, the secured creditor is required to provide out of his security all the amounts that may be owing to employees, including severance pay, then it is almost certain that the officers of the banks and the finance companies will feel that they have a duty to their shareholders to follow the directors, because under the act they would be subrogated to the employees' rights.

The really insidious thing about this provision is that it is going to come right back to the directors personally when, in fact, this has not happened to date, and the potential liability of anyone agreeing to act as a director of a labour-intensive company would be something that would frighten any prudent man. This is the major reason why we need a fund. This is impractical insofar as concerns its effects on getting responsible people to act as the directors and officers of Canadian companies.

The Chairman: And to obtain financing.

Mr. Biddell: Yes.

Mr. Baird: Assuming there is a fund, should the fund have the right to make a claim against the officers and directors?

Mr. Biddell: No. As a matter of fact, in the discussions I have had with people who are interested in the outcome of this bill, I have heard it suggested that they would not be at all averse to moving to delete from the Canada Corporations Act, and then hope to persuade the attorneys general of the various provinces to delete from the provincial corporations acts those sections which impose personal liability on the directors for unpaid wages once this fund is established, and I think that is the way it should be.

The Chairman: Of course, there is precedence for us to make an amendment to this bill dealing with that situation and, through this bill, amend the Canada Corporations Act.

Mr. Biddell: I think, effectively, that could be done.

The Chairman: There is certainly precedence for it.

Mr. Biddell: Mr. Chairman, those are all of the points which we felt we should speak to at this time. There are additional points in the detailed brief, and in leaving it with members of the committee I should like to point out that this is an interim submission. It is not in the form that we would like to have presented it, but we are hopeful that when this bill is revised we will have an opportunity to appear before you again.

The Chairman: We expect that, as and when we table a report on the subject matter of Bill C-60, the department will make use of it in revising the existing bill; and when the existing bill, in its revised form, comes officially before us, having gone through the House of Commons, we will be studying that bill to see how well the officials did their homework, as we recommended they should. In that sense, there is still time for further ideas.

Before adjourning, I want to thank you very much for all your assistance.

Senator Macnaughton: Mr. Chairman, may I just say that I think we have been very fortunate today in that we have had some extraordinarily competent and interesting witnesses.

The Chairman: That is right. Of course, our knowledge and appreciation of the competence of Mr. Biddell is not something recently acquired. Mr. Biddell, as some honourable senators will recall, appeared before us in 1966, at which time, because of the competency he exhibited, I asked him to stay for the entire hearing, which he did, and he was most helpful to the committee.

Any time we can sign you up as a permanent witness at no fee, Mr. Biddell, we will be glad to do so! Since you have a way of acquiring jobs, I hope some of them produce fees.

The Committee adjourned.

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FIRST SESSION—THIRTIETH PARLIAMENT
1974-75

THE SENATE OF CANADA

PROCEEDINGS OF THE
STANDING SENATE COMMITTEE ON

BANKING, TRADE AND COMMERCE

The Honourable SALTER A. HAYDEN, *Chairman*

Issue No. 66

THURSDAY, NOVEMBER 27, 1975

Fourth Proceedings on Bill C-2, Intituled:

"Ac Act to amend the Combines Investigation Act and The Bank Act and to repeal an Act to amend an Act to amend the Combines Investigation Act and the Criminal Code"

(Witnesses: See Minutes of Proceedings)

29746—1

THE STANDING SENATE COMMITTEE ON BANKING, TRADE AND COMMERCE

The Honourable Salter A. Hayden, *Chairman*

The Honourable Senators:

Barrow	Hayden
Beaubien	Hays
Buckwold	Laird
Connolly (*Ottawa West*)	Lang
Cook	Macdonald (*Cape Breton*)
Desruisseaux	Macnaughton
Everett	McIlraith
*Flynn	Molson
Gélinas	*Perrault
Haig	Sullivan
	Walker—(19)

**Ex officio* members

(Quorum 5)

Order of Reference

Extract from the Minutes of the Proceedings of the Senate, October 28, 1975.

> "Pursuant to the Oder of the Day, the Senate resumed the debate on the motion of the Honourable Senator Cook, seconded by the Honourable Senator Paterson, for the second reading of the Bill C-2, intituled: "An Act to amend the Combines Investigation Act and the Bank Act to repeal an Act to amend an Act to amend the Combines Investigation Act and the Criminal Code".
>
> After debate, and—
> The question being put on the motion, it was—
> Resolved in the affirmative.
>
> The Bill was then read the second time.
>
> The Honourable Senator Cook moved, seconded by the Honourable Senator Burchill, that the Bill be referred to the Standing Senate Committee on Banking, Trade and Commerce.
>
> The question being put on the motion, it was—
> Resolved in the affirmative."

Robert Fortier,
Clerk of the Senate.

Minutes of Proceedings

Thursday, November 27, 1975
(86)

Pursuant to adjournment and notice the Standing Senate Committee on Banking, Trade and Commerce met this day at 11:00 a.m.

Subject: Bill C-2—"An Act to amend the Combines Investigation Act and The Bank Act and to repeal an Act to amend an Act to amend the Combines Investigation Act and the Criminal Code".

Present: The Honourable Senators Hayden (*Chairman*), Barrow, Connolly (*Ottawa West*), Cook, Desruisseaux, Haig and Lang. (7)

In Attendance: Messrs. R. J. Cowling and John F. Lewis, Advisors to the Committee.

WITNESSES:

Department of Consumer and Corporate Affairs:

The Hon. André Ouellet, P.C., Minister; and

Mr. Robert J. Bertrand, Assistant Deputy Minister and Director of Investigation and Research.

The Committee, together with the witnesses, proceeded to further discuss the said Bill as passed by the House of Commons.

At 1:15 p.m., the Committee adjourned to the call of the Chairman.

ATTEST:

Frank A. Jackson,
Clerk of the Committee.

The Standing Senate Committee on Banking, Trade and Commerce

Evidence

Ottawa, Thursday, November 27, 1975

The Standing Senate Committee on Banking, Trade and Commerce, to which was referred Bill C-2, to amend the Combines Investigation Act and the Bank Act and to repeal an Act to amend an Act to amend the Combines Investigation Act and the Criminal Code, met this day at 11.15 a.m. to give consideration to the bill.

Senator Salter A. Hayden (*Chairman*) in the Chair.

The Chairman: Honourable senators, the situation today that delayed our meeting is something that not even the competition bill could control. The thought of the minister in charge of that bill being snowbound on the streets of Ottawa is a horrible thought, Mr. Minister.

The Honourable André Ouellet, Minister of Consumer and Corporate Affairs: It is terrible.

The Chairman: However, here we are. We have a few remaining items to deal with. An item we were talking about last time we sat was the question of the two proclamations provided for in the concluding clauses of the bill. There is a separate proclamation provided for to bring into force section 32, which is the main prosecuting section, dealing with conspiracies and so on. The question there is that of services and offences in connection with them, which are not presently covered by the bill.

In the meantime, we have been doing a lot of thinking about it, although I would not say we are anywhere near a resolution of the problem, because every time we think of a way of dealing with it we think of answers to our first thoughts, and it does not appear an easy thing to deal with. I suggest that this morning we must continue working at the level of the minister and his officials and our experts to see what can be done in a practical way.

Otherwise, the items outstanding are the questions of civil damages, appeals from the Restrictive Trade Practices Commission in respect of orders they may make, interim injunctions, and franchises.

The bill, as it is now before us, reflects a number of situations on the subject of franchises, providing certain cases where, if the franchise arrangements are thus and so, there is no offence under the bill. It does not seem to deal with the simple problem, which is if there is a franchise in relation to one product. It deals with that situation only in what I call the bottlers, the concentrate supplied by a person holding a trade mark right or brand name for a product such as a soft drink; he makes an agreement under which on certain terms and conditions he sells the concentrate to someone who will process it into a saleable product and have the right to use the trade name. That situation is covered in the bill. Generally, the product situation where you are limited to dealing with one product is not covered and, therefore, there is the question of offence under the bill as drawn. The minister has dealt with the situation on multiplicity of problems. The IGA, as such, does not have many products of their own. If you enjoy a franchise right and the IGA plan of marketing, there is provision in the bill which would permit the continuance of that kind of practice. Is that not correct, Mr. Cowling?

Mr. R. J. Cowling, Special Counsel to the Committee: Yes, Mr. Chairman. The typical IGA franchisee, as I understand it, may be obliged to carry the IGA brand of coffee, for example, but he is not prevented from also carrying Maxwell House and as many other brands as he wants to. Doubtless that is what is meant by "multiplicity". That would, effectively, exempt that kind of arrangement from the provision in the act.

Hon. Mr. Ouellet: Yes.

The Chairman: On the single product arrangement, about the only one you could say was covered would be the bottlers, is that right?

Mr. Cowling: That is covered by another section.

The Chairman: Was there any reason why that was the approach taken?

Hon. Mr. Ouellet: I would like to draw the attention of the members of the committee to an amendment that was passed, at the report stage, where we widened the scope of the particular exemption that was granted to the bottlers, rather than at an earlier stage. I would refer the members of the committee to paragraph 31.4(5)(c), which you will find at page 18 of the bill, and section 31.4(7) at page 19 of the bill. You will see from the new wording that to a very substantial degree the Senate recommendation has been accepted.

Now, why we did not go further than this was basically because we were convinced that to go further would completely emasculate Part IV.1 contained in the bill in respect of one of its most important objectives, which is to afford relief to the independent service station operators, who are on franchise by the oil companies. It is to avoid such emasculation that paragraph (c) and subclause (7) are carefully and restrictively worded. I feel that the section as it is drafted takes care of all the situation, which were brought to our attention, and in our view, warrant relief. The IGA cases were brought to our attention. We feel that they are well covered within this wording. We have to look at it in terms of a highly competitive environment. The food industry is surely a very competitive area.

I must remind the members of the committee that what we are talking about here is not an offence, per se; it only means that these practices are subject to revision.

Mr. Cowling: Mr. Chairman, may I make a couple of points?

The Chairman: Yes.

Mr. Cowling: The first point is that it seems to me doubtful that the IGA situation would have been caught under the provisions of the bill, even without the amendment. The minister might want to comment on that.

My second point is really a question that I would like to put to the minister. The minister referred to gasoline service stations. Was the intention there to enable the dealers to stock products other than those supplied by the particular oil company with which they have an agreement? Was that the idea? I am sure we all know, from personal experience, that if you go into a certain gas station and ask for a product, they may not have it because they only have the particular line that is supplied to them by their particular oil company. If that is the purpose of not including that kind of situation in the exemption, is there not a danger that the oil companies may seek to not have dealerships and operate directly at the retail level; in other words, to take over their own outlets so they can have complete freedom as to the products offered?

Hon. Mr. Ouellet: In reply to your question, I would say, first of all, that you are quite right in the IGA case. We were under the impression, as we said publicly, that they had no reason to fear that the act would prevent them from doing that. Some people insist on having this type of precision, and it was done. Basically the act was not in any way impairing their activities.

As to your second point, I would say that these activities will have to be reviewed by the commission. It is only after examination by the commission that the commission could indicate, in terms of good competition, that these service stations should have other products. It will not automatically be the decision; it will have to be looked at. For the type of cases that you are speaking of, it is possible, but we will have to deal with those at a later time, if this ever happens.

The Chairman: It seems to me that this situation could easily arise if an oil company has certain dealerships where they are operating at arm's length, as between them and the oil company, and they have an agreement for paying a certain price for their product. You have also subsidiary companies in relation to the oil companies. The products may very well be supplied to the subsidiary company that is carrying on business at a lower price.

I thought that was the basis of the complaint; that is, that the oil companies in dealing with their own dealers, who are subsidiary companies, might give a benefit that is not available to the others. It is competition in reverse. In other words, in that instance it has the effect of not making a provision for that kind of situation. If it were inspired by that motive, then it would prevent the subsidiary companies of the oil company from selling at a lower price, which they could do if they acquired the product for a lower price.

Hon. Mr. Ouellet: I must remind the members of the committee that by dealing partially in this bill with some aspects of the question we are just plugging up a few holes; we are not really covering all the ground, as you have very well indicated.

The structural problems and structural activities of companies will be dealt with in phase two. We will be addressing ourselves to some of the other holes that could exist, then, when we come to phase two.

Mr. Cowling: Mr. Minister, that contemplates the possibility of going so far as to prevent a manufacturer from dealing at the retail level.

Hon. Mr. Ouellet: I am not suggesting that. We will have to wait and see what phase two will be. As you know, and they will be publishing a working paper which we will analyse before drafting the legislation.

Mr. Cowling: If I may say so, I think the effect of this bill on franchising has been greatly misunderstood by the public. I would certainly acknowledge that. Franchising means different things to different people. It is not a word which conjures up a typical set of relationships; it is quite varied.

The one criticism that does remain is that even though it is a reviewable practice—and I appreciate that the commission may decide the practice is quite in order in any given set of circumstances—nevertheless, the companies that are doing that now are reluctant to risk a case before the commission, and, in fact, some of them have been thinking in terms of changing their practices so that they will not have to face a case before the commission.

The end result is, and this is the big criticism, that it does discourage that degree of entrepreneurship or opportunity for the small businessman which seems to be rather commendable.

Hon. Mr. Ouellet: Yes, it is commendable, and I have to agree with you that the whole question has been rather misunderstood. Obviously, the act does not discourage franchise operations. To give you an example, franchise operations in the United States come under their combines act, but, despite that, the potential of good franchise operations has not been at all diminished in the United States. On the contrary, franchise operations are flourishing there to a high degree. Certainly, our Canadian act is no worse than the American act, and I see no reason why franchise operations should not flourish here as well.

The Chairman: Mr. Minister, a problem which has been looming up large so far as we are concerned is the aspect of civil damage proceedings together with the attitude shown thus far in your department and your view—and I am satisfied that the bill reflects your view—on the question of the definition of what is the record of proceedings.

You will recall that in the matter of civil damages, regardless of what approach you take to the matter of civil damages, there is no question that if a person has been hurt or damaged by the breach of the Combines Investigation Act he should have some facility available to him for seeking compensation. I believe no one would argue against that as a general principle. But your civil damage rights go further than that. First, they permit any person to sue who can establish that he has been hurt and where the courts have established by a conviction that company "X" or "Y" was the one which hurt him by the practice indulged in. But to give the right to a person to sue for damages when he claims that he has been hurt, but when no prosecution has been commenced and no conviction has resulted, does seem to me at this stage a rather unwarranted extension, and it will certainly lead to a substantial increase in the number of actions being brought. What might the next step be? It might be class actions, such as they have in the United States, through which a person can sue not only on behalf of himself but on behalf of all others who may be in the same position.

As to the other part of it, what constitutes the record, it might well be that a prosecution would ultimately be taken against the company which has been responsible for a person being hurt. The result of that prosecution might well be an acquittal, criminally, while in the meantime a civil action for damages is proceeding on the basis of the allegation that there has been a breach of the statute. In those circumstances if the judge, civilly, decides that there has been a breach he may well award damages while, at the same time, in a criminal prosecution the courts have decided that no offence has been committed. Have you any comments on that situation?

Hon. Mr. Ouellet: Mr. Chairman, when the Senate committee recommended that the right to recover damages under section 31.1 be restricted to cases where there had been a conviction for the conduct complained of, and that it be expressly provided that only damages which were the direct result of such conduct be recoverable and that the record of criminal proceedings made admissible in the civil action not include a transcript of evidence or documents or other exhibits produced in the criminal proceedings, the committee assumed in making that recommendation that the procedures along such lines would obviously be of a type different from the procedures followed in cases in the normal practice of justice.

There seems inherent in that a request for a certain different approach, because it is obvious, for example, that if someone were to become involved in a car accident today he could be prosecuted under the Criminal Code for gross negligence and at the same time could be prosecuted for civil damages under civil procedures. It might well happen that under the criminal prosecution he would be acquitted and yet at the same time be condemned to pay damages in the civil action.

So, in fact, the example you have posed, Mr. Chairman, does occur in other types of action. It is quite possible for a person to win his case in the criminal court and lose it in the civil court. I believe it to be necessarily implicit in section 31.1, as it stands, that only damages flowing directly from the conduct in question be actionable. In my opinion, the extra words are unnecessary and would even be confusing.

I must say that I see no reason for denying a cause of action where there has been no conviction, if, in fact, the plaintiff is prepared, as he must be, to prove his case from the beginning. In fact, his civil recourse is not going to be paid for by the government; it will be his own recourse. I think that if the plaintiff prefers to follow this route he should be allowed to do so.

As for the other questions, I repeat, I know of no other instance where parallel criminal and civil proceedings exist, in which a plaintiff is so restrained. In my view, the example of the car accident that I gave you is a good example of this. I believe that so to restrict the admissible record would create unnecessary duplication, particularly in view of the fact that any witness who appears at the criminal trial can always be recalled. I think it is important for members of the committee to look at this and to realize that in fact any witness who appears at a criminal trial, if the documents and records are filed and are admissible, can always be recalled for further examination or cross-examination.

Mr. Cowling: What if he dies in the meantime, or leaves the country? That is the difficulty.

Hon. Mr. Ouellet: Well, that is a difficulty that faces every court every week, I suspect. You know that courts hear cases months or years after the facts in question. This is something that happens all the time.

Mr. Cowling: But it is not in every case, Mr. Minister, that the complete record of the proceedings in a criminal trial can be used holus-bolus in the civil proceedings.

The Chairman: There is this point, also, Mr. Minister, that you have not applied yourself to, as I see it: you say that I can examine or cross-examine anybody who appears as a witness. Certainly I can do that, or I can call any witness whose evidence may be relevant; but if I am defending in a civil action, and the whole record of the proceedings in the criminal case is presented, as is permitted under the bill in its present form, I have no opportunity to cross-examine those witnesses. I can call the witnesses, of course, but they are then my witnesses, and I can only examine unless I can so provoke them that they become adverse.

Hon. Mr. Ouellet: Yes, and I am sure you would do it.

The Chairman: Well, I am sure that it is a well recognized practice. I would call you as a witness and as the first supporter of that view. It is certainly a practice that is followed. However, why should I have to depend on that? The direction of the conduct of a criminal case may well be entirely different from that in a civil action, and you are more likely to try to get along with fewer witnesses in a criminal proceeding than you are in a civil one. These are all judgment decisions with which anybody who is engaged in litigation is quite familiar; but if what a principal witness for the crown has said in a criminal prosecution arising out of a breach of the Combines Investigation Act may then be presented to the court, and made part of the case for the plaintiff, I have no way in which I can cross-examine that person unless I can call him as my witness; but the difference between calling somebody as your own witness, and cross-examining him, is entirely different, as you well know. I am sure Mr. Bertrand knows this too. Any lawyer who has indulged in litigation appreciates that very well. Cross-examination and the ability to cross-examine carefully and strategically wins a lot of cases; but now you are shutting off that avenue.

Hon. Mr. Ouellet: I am not shutting off this avenue, Mr. Chairman, because obviously the witness you are talking about would in the first place have been a crown witness, and I am sure that the defence lawyer would have cross-examined him. It is quite clear that if he was a key witness he would already have been cross-examined.

The Chairman: I think that is an assumption that is rebuttable.

Hon. Mr. Ouellet: Maybe. You say that to examine a witness is not as good as cross-examining him, and I concede this point; but we have to weigh this point against another aspect, namely, duplication, and costly duplication. The legislators want to pass legislation that is not only right, but that appears to be right. Very often people say that justice is easier for the rich man, and more difficult for the poor man. Obviously, if we insist on duplicating things by having another trial we are going to make litigation more expensive. We have to know what we are talking about, and we will obviously be dealing with types of practices that could occur very often in cases

where the defendant is a large company and the plaintiff is an individual or small businessman. I therefore submit that to ask for this unnecessary duplication could lay an extra burden on the small man.

I agree that to be forced to examine a witness rather than to cross-examine him is not an ideal situation; but we had to weigh the two alternatives, and we felt that in these cases we had to make things easier for those who are not as fortunate as others, rather than opting for a long judicial process.

Senator Cook: Perhaps the judge would be easier on you, knowing you were stopping a crown witness, anyway. He might give you more latitude.

The Chairman: I think the minister is making as good a case as he can with the facts he has at his disposal, and I would expect him to do that; but, in the first place, the plaintiff in a civil action does not necessarily have any particular identification with the principles in a criminal proceeding. His course of action arises from having been hurt by the conduct of somebody who has violated a provision of the criminal law. Therefore, what he has to establish in order to get damages is, first, that there has been a breach of the criminal law, and, second, that he has been hurt and has suffered damages by reason of that breach. The essential part of the plaintiff's case in a civil action is that he must prove the breach; he must prove that he has been hurt; and he must prove the quantum of damages. To make the evidence in a criminal prosecution, which may or may not have led to a conviction, all part of a record that can be produced to establish the facts in the civil action, in my view, is going too far. I think that to identify the plaintiff in the civil action with what has happened in the criminal prosecution is unfair.

Mr. Cowling: Mr. Chairman, I should like to clarify one point that may have been overlooked by the minister so far as the Senate recommendation is concerned. The Senate recommendation did not require complete duplication by any manner of means. The recommendation took the form of a re-definition of the phrase "record of proceedings," and it simply said, take out the transcripts of oral evidence and the exhibits and you would be left with the indictment and the judgment of conviction, and that would constitute the proof of the fault, if you are talking civil language, or the tort, if you are talking common law language. That is of significant advantage to the plaintiff because he has well over half his case proven with that part of the record of proceedings, but the difficulty arises with the words at the very end of subsection (2) of section 31.1 which read as follows:

> and any evidence given in those proceedings . . .

meaning the criminal proceedings—

> as to the effect of such acts or omissions on the person bringing the action is evidence thereof in the action.

I think that is where the difficulty arises and what is going to happen, unless the definition is changed, is that the defence counsel in every criminal prosecution will now have to look ahead at the possibility of a civil action being taken and his cross-examination will necessarily have to be a great deal more protracted than it otherwise would be because he may lose the witness between the criminal proceedings and the civil proceedings. So he will have to start making his defence in the civil action right in the criminal action, and this, of course, will result in much longer trials, for one thing.

Hon. Mr. Ouellet: That may be, but I do not think that there is anything wrong in this. Obviously I always go back to my case of the motor car accident. If somebody has been involved in an accident where he has been hit by a drunken driver, although the driver might be exonerated on the charge of drunken driving that does not mean that the victim does not want compensation.

The Chairman: That is because you are looking at a different principle. The test in a civil action for damages by reason of the operation of a motor car is based on negligence. If you are talking about a drunk driver, if he is impaired and if he has more than a certain percentage of alcohol in his bloodstream, then he has committed an offence anyway, and if that has been so found, then the evidence is not imported from the criminal prosecution into the civil action. The evidence has to be adduced in the civil action.

Hon. Mr. Ouellet: Yes, but it is obvious that you would not want to be forced to wait until the criminal case is heard and disposed of before moving in with your own civil action. On the other aspect of the situation, I believe that perhaps it should be looked at again in review. I am not an expert on court procedures, but I have the feeling that the circumstances could very well justify an examination that could become a sort of cross-examination, if you want to call it that. I think you said it half jokingly earlier, but I think you were right that the judge, because of the circumstances, will allow the lawyer for the defence to pursue his line of questioning much further down the line, if you want to put it that way, than he would do in another case if, in fact, there has been a necessity on the part of the defence in the civil case to examine and cross-examine the witness.

The Chairman: But there are two things, Mr. Minister. First, under the jurisprudence I can only get the right from the judge to cross-examine my own witness if the judge is convinced that that witness is adverse. There is no basis for assuming that the judge might depart from that jurisprudence, so are you proposing to rewrite the law of evidence?

Hon. Mr. Ouellet: No, no, I am not, and I preface my remarks by saying that I am not a great expert on court procedures, but I have the feeling that the court in these circumstances would permit more serious examination than it would normally do.

The Chairman: We have been talking about a case where there is no prosecution but there is a civil action. But let us take the case where there is a prosecution and where there is a civil action. No lawyer should say, "This is the law!" because while it may be his view of the law, it does not mean it is the law, but let me say that my view of the law and what a judge might do is this. If I make an application to the court to delay the civil action until the criminal prosecution has been concluded, because it could be to my prejudice in the criminal action to have an exposure in a civil action going on at the same time, I am reasonably certain that in a situation of that kind the civil proceedings would be adjourned.

Hon. Mr. Ouellet: That is possible.

The Chairman: If I were still practising litigation, which I am not now, I think the percentages would be very good because the courts are always very careful that the accused in a criminal case is not exposed to any unfair risk that would interfere with his freedom of presenting a

proper defence. He might be examined for discovery in the civil action, and he could be questioned on that discovery in the civil action. So I am sure there would be some stay of proceedings. So in fact we are not accomplishing anything.

Hon. Mr. Ouellet: Perhaps not, but at the same time we are leaving this option open, and I think it is important that it be there because, if it is not there, that means that the plaintiff in such a case would be unduly restrained in his course of action. You may be right that the court will be very prudent in allowing him to go ahead with a civil case while there are criminal proceedings taking place, but I think it would be wrong on our part to deny that course of action to the plaintiff.

The Chairman: That is your viewpoint and you have told us your reasons. You have our viewpoint an our reasons.

Senator Connolly: Under section 31.1(2), if there is no conviction, the plaintiff does not have the advantage that he would otherwise have if there had been a conviction, so, in that case, he must embark upon the whole process of the criminal law before he proceeds to prove that it disaffected him. Following that he must prove the quantum of damages, is that correct?

Hon. Mr. Ouellet: He must establish, himself, his case from the beginning.

Senator Connolly: That is right; this is a proceeding *de novo* because there has been no conviction. He must start right from the beginning and make the proof which, perhaps, in a criminal court might have been sufficient for a conviction.

Mr. Cowling: The question is, which burden of proof is it? Is it the civil burden of "preponderance of probabilities," or the criminal burden of "beyond a reasonable doubt"?

Senator Connolly: The onus is greater in the first case.

Mr. Cowling: And, since the Federal Court has been given jurisdiction, amongst other points, to try the civil action and also has the jurisdiction under the bill to try the criminal action, we have the odd situation that one judge of the Federal Court hearing a criminal action might come to a different conclusion, if there is a difference in burden of proof, than that of his brother judge hearing the civil action. The only court which could resolve the matter, I suppose, would be the Federal Court of Appeal or the Supreme Court of Canada. If the burden of proof is the same in both the civil and the criminal actions, there can only be one answer and one result. However, the bill does not refer to burden of proof.

Senator Cook: It seems to me that in the final analysis this would help the defendant, rather than hurt him, because witnesses are inclined to be much more careful and precise in a criminal action than in a civil action. So, if the record of the criminal action is made part of the civil proceedings, it is more likely to help the defendant than hinder him, because the witnesses then are not so inclined to apportion blame and be so free in their deductions as they would be in a criminal matter.

The Chairman: Senator, I do not think so, and may I tell you why? The cause of action is set out in section 31.1, which provides:

> Any person who has suffered loss or damage as a result of
>
> (a) conduct that is contrary to any provision of Part V . . .

Now, Part V is section 32, all the criminal conspiracies, et cetera. So the plaintiff must establish that the XYZ company has been guilty of conduct contrary to a provision of Part V, whatever it may be. In other words, it must be proved that the defendant has committed a breach of a criminal provision of Part V of the Combines Investigation Act. If the criminal prosecution has proceeded and there has been a conviction, all that is necessary is to file a copy of the record of the conviction and the case has been made out as to liability. Then he must prove that he has been directly affected and hurt, and he has to establish the quantum of damages. However, if the whole record in the criminal trial is then brought into the civil record . . .

Senator Cook: But who are we concerned about, the plaintiff or the defendant? I thought we were concerned about the defendant.

The Chairman: The reason the plaintiff would bring the whole record in is that if the crown has succeeded there has been quite an exposure in some detail of all the facts bearing on this situation. Otherwise, the plaintiff would have to make out his case himself as to the conduct, but it is ready-made for him.

Senator Connolly: Does this trial, Mr. Chairman, come down to this, that I walk into court with a record of a conviction against the defendant in my case—I am for the plaintiff—and I put that on the table, file it as an exhibit, ask the court to take notice of it and then proceed to assess my damages? Is that what the trial will be?

Mr. Cowling: It might be, in my opinion, without any further amendment that you might not even have to go the second step to which you refer, Senator Connolly.

Senator Connolly: Do you mean, the assessment of damages?

Mr. Cowling: The assessment of damages.

Senator Connolly: Oh, that would have to be done.

Mr. Cowling: I suppose the quantum would have to be fixed, but if there was any evidence in the criminal proceedings of the effect on the plaintiff and whether it was a direct effect, or an indirect effect, that is correct and it would not be necessary to adduce any evidence on that point. So it might come down to a very simple procedure of fixing the dollar amount.

Senator Cook: Why should it not?

Senator Connolly: I gather that the chairman is of the same view, as also is the minister, that it is almost a pro forma proposition once you have a conviction, file your material and assess the damages. In the assessment, I suppose, it becomes obvious that these damages have been inflicted as a result of the commission of the offence.

The Chairman: We have given it a pretty good shake. We have not resolved the difference as between the minister, his officials and ourselves, but he certainly knows our thinking. This is a matter that, when we are reviewing the bill and settling on the report, we will have to weigh in the light of the minister's remarks and the views of members of the committee.

Senator Connolly: Is it fair to say that the minister feels that the plaintiff should have this advantage because of the expense and time involved in duplicating the hearing? I do not mean whether there has been an offence against the Criminal Code.

Hon. Mr. Ouellet: Yes, sir.

Senator Connolly: That is a summary of it.

The Chairman: With respect to the question of appeals, Mr. Minister, we have indicated in our report that we believe there should be an appeal from the order of the commission. We did not feel that section 28 of the Federal Court Act gives a real right or appeal on contains anything satisfactory. We suggested, therefore, that there should be a right of appeal, even if there is an appeal to the Federal Court. Did we recommend that there be a further appeal, or simply an appeal to the Federal Court?

Mr. Cowling: I believe, Mr. Chairman, that there would always be the right of the further appeal. It was the nature of the appeal to the Federal Court that concerned us. The appeal provided in section 28 is to the Federal Court of Appeal and is rather circumscribed. The Senate committee's recommendation was that it be to the trial division of the Federal Court and that the Federal Court have much wider powers in disposing of that appeal than it would under section 28. That is, it could dismiss the appeal, or allow it, or vary the decision, and generally look into the whole factual situation much more closely than it could under a section 28 appeal to the Federal Court of Appeal.

I think the reason for the concern is, in part, related to the makeup of the commission. We are talking about appeals from the orders of the Restrictive Trade Practices Commission which, of course, under the act as amended by the bill has a number of duties. Some are of an investigatory nature, some are of an executive nature. In addition, Bill C-2 would give the commission quasi-judicial duties. In a number of the submissions that were made to the committee, the advisability of combining all those functions in one body was questioned. The Senate committee made no recommendation as to dividing up the commission. That is to say, it was not recommended that a special body be set up to handle the reviewable practices part of it and that we have another body for the other functions of the commission that have always been in the act. I think that was the reason why it was thought to be particularly important to have a rather wider type of appeal from its orders than might otherwise be necessary.

The Chairman: You may recall that the other day I was a little facetious. You may not have read it, Mr. Minister. I said we had another bill before us where you have a multiplicity of appeals provided. I said: Here we are, struggling to get a right of appeal in this bill, and it is being resisted. We are told, "You have enough under section 28 of the Federal Court Act." Then we have another bill before us where there is a substantial multiplicity of rights of appeal.

I am not naming the bill, but if I gave you a chance to guess, I am sure you could figure out which one it is. It is an extraordinary situation, that in the case of an appeal from a body exercising quasi-judicial powers—which is part of the investigatory processes under the Combines Investigation Act, and which even enters into the picture where evidence is being gathered and witnesses are being examined—after the director has made his report, and that course is followed, his report goes to the Restrictive Trade Practices Commission. It then goes from there to the Minister of Justice and he makes a decision on prosecution; or you may short-circuit the whole thing and have the reference made from the director and his report to the Minister of Justice with a recommendation for prosecution.

My understanding is that the Restrictive Trade Practices Commission will loom up even more largely in its duties and functions when phase two comes along. You may say, "Well, wait for phase two," but from information we have had recently, it would appear that phase two is not just around the corner, not even in the minds, certainly, of some of your officials. It might be 1977 before the bill gets to Parliament, and it might be 1978 before we get to the stage where it could pass into law. In the meantime, we are offered this teeny weeny bit of an appeal under section 28 of the Federal Court Act, and that's all. What is the reason for that?

Hon. Mr. Ouellet: Mr. Chairman, I am glad you have given me the opportunity to reiterate that phase two is not something for the distant future; it is something that we shall be dealing with in the early part of next year. If I have my way, I hope the Senate committee will be dealing with the bill before the summer. I base my declaration on the fact that it was predominant in the document published by the government in its fight against inflation that all aspects of competition are of significant importance, and that the government wants to speed up work in this area.

We will be making public, in December, the work of this group which has been asked to prepare the work on what could be phase two. It will be discussed in the early months of the new year. I am planning to table, in the next session of Parliament, the bill dealing with phase two of our competition policy, and hopefully your committee, Mr, Chairman, will be able to commence studying it before it is officially referred to you.

The Chairman: You can be sure of that.

Hon. Mr. Ouellet: So when you speak of 1978, I think it will be 1976. That is my Olympic project!

The Chairman: I do not know whether you want two great events in one year: the Olympics and phase two of this bill. If there is any value in having two occur in the same year, anything that we do would not interfere with that. It is more likely to be interfered with in the other place.

Hon. Mr. Ouellet: First, that is the assurance I want to give. Secondly, I would like to answer the question you have just asked me: why are we not giving a wider right of appeal? Let me say that this act—you have already said it, but I think it is useful to repeat it—already provides a right of review from the Restrictive Trade Practices Commission. The right of review is there for any commission that exists. That is, the right of review provided by section 28 of the Federal Court Act.

I have a note here. Perhaps I could read it for the information of the committee. There is a right of appeal on the ground that such body—that is, the Restrictive Trade Practices Commission:

> (a) failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction;

Senator Connolly: What is the section of the bill?

The Chairman: It is section 28 of the Federal Court Act.

Hon. Mr. Ouellet: Yes; which, in fact, is statutory. Every federal commission is subject to this section. It is a standard right of appeal. I repeat:

> (a) failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction;
>
> (b) erred in law in making its decision . . .
>
> (c) based its decision or order on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it.

These are the review procedures that are generally applicable in respect of all federal boards and commissions.

What your committee would like to see is a right of appeal to the Federal Court of Appeal, not only on what is already prescribed by section 28 of the Federal Court Act but also on questions of law or questions of fact. I do not see how any right of review could be meaningfully wider than that conferred by section 28, unless it was the intention to allow the Federal Court of Appeal to substitute its view for the that of the commission. If you are going to provide a right of appeal on questions of law and questions of fact, then you are asking the appeal court to substitute its view for that of the commission, thereby defeating the very purpose of setting up a tribunal with a specific expertise in the field of competition law.

I should like to point out to the committee that the Treaty of Paris, which is the Constitution of the European Coal and Steel Community, contains a provision which authorizes the commission of the European Economic Community to make orders prescribing agreements and concentrations which may be harmful to competition within the Economic Community, or allowing such concentrations when they come within specific exemptions. The orders of the commission are appealable to the Court of Justice of the Community, and the grounds of appeal are as follows: (a) lack of legal competence; (b) a major violation of procedure; (c) violation of the Treaty or any law relating to its application; and, (d) abuse of power. It goes on to say:

> However, the Court may not review the Commission's evaluation of the situation, based on economic facts and circumstances, which led to such decisions, except where the Commission is alleged to have abused its powers or to have clearly misinterpreted the provisions of the Treaty . . .

I submit, Mr. Chairman, that constitutes almost entirely what is provided by section 28 of the Federal Court Act.

Senator Connolly: Except in respect of questions of fact.

Hon. Mr. Ouellet: No. It says:

> However, the Court may not review the Commission's evaluation of the situation, . . .

And you apply that to our commission.

> . . . based on economic facts and circumstances, which led to such decisions . . .

If Bill C-2 were to provide an expressed right of appeal, that right would have to be qualified in the same way as the right of appeal is qualified in respect of the commission of the European Economic Community so as not to defeat the purpose of conferring these powers on a specialized tribunal under Part IV.1.

If the right of appeal were qualified in that way, I think we would be right back to section 28 of the Federal Court Act, or so close to it as to make the expressed right of appeal almost indistinguishable, for all practical purposes, from the right of appeal under section 28 of the Federal Court Act.

The Chairman: Mr. Minister, I do not know what the risk is, or even the concern, of going into the guidelines in respect of the commission of the European Economic Community. They may be designed for an entirely different purpose.

All you have here is a commission, and while it may be endowed with all the wisdom in the world, on the question of the conclusion that it draws from a set of facts that are presented to it by the director—and the onus is on the director to make a case—it may decide, notwithstanding what the supplier has said, that the director has made a case. Factually, the commission may conclude that, or it may interpret the law under which it is acting so as to conclude that the supplier had violated that law. In one case you have a question of fact and in the other a question of law, or you may have mixed questions of fact and law. To say that there should not be an undoubted, clear-cut right of appeal bothers me.

Hon. Mr. Ouellet: I do not want to interrupt you, Mr. Chairman, but there is in fact a right of appeal under section 28 of the Federal Court Act in the case you have described, and that right of appeal is specific. If there is an error in law in arriving at the decision of the commission, there is a prescribed right of appeal under section 28 of the Federal Court Act.

The Chairman: What you would have to do is analyse all of section 28. There is the right of appeal on law under section 28.

Senator Lang: It is really broader, is it not, Mr. Chairman, than the right of appeal from the Ontario Securities Commission to the Ontario Court of Appeal?

The Chairman: It may very well be, but the question is whether we are going to take the guidelines offered by the Ontario Securities Commission Act, which were designed to accomplish certain things and to make as reasonably certain as possible that the decisions of the Ontario Securities Commission are upheld.

Senator Cook: As I understand it, if the Federal Court does not find any error in fact and does not find any error in law, then it cannot substitute its judgment for the judgment of the commission. That is what it boils down to. In other words, if I do not like the judgment of the commission, I could appeal to the Federal Court, notwithstanding that there was no error in fact or in law, and have it substitute its judgment for the judgment of the commission.

The Chairman: That is what happens in any appeal. In non-jury civil matters, for instance, where there is an appeal from the trial judge, the court of appeal, in many instances, reverses the decision of the trial judge on fact and on law, or on one or the other. However, where there is a jury decision, the court of appeal will not reverse the finding on the basis of fact unless it is perverse.

Senator Cook: But this commission is supposed to give directives on economic, marketing and trade matters, none of which has anything to do with the court.

Hon. Mr. Ouellet: The very existence of the commission would be in doubt if in fact the court of appeal on any questions of fact could substitute its judgment for that of the commission. If that were so, the commission would have no real purpose.

Senator Cook: You are not appealing on a question of fact or of law; you are appealing the judgment of the commission, the wisdom of the commission. You do not want to do that. There are no facts when you get to the Federal Court, there are no facts in dispute; no legal error has been made; you question the wisdom of the commission. That is what you do not want here.

The Chairman: With respect, Senator Cook, I do not think you have stated it in the right way. If I have a right of appeal from the judgment of a Toronto judge, I can support that on the basis of law or fact; in other words, that the trial judge has erred.

Senator Cook: Yes, that the trial judge has erred in law or erred in fact. In this case, when you get to the Federal Court, assuming you cannot establish that the commission erred in fact or made a mistake in law, notwithstanding that you ask the Federal Court to substitute their judgment for the judgment of the commission. This is what they want to avoid.

The Chairman: That is the whole essence of an appeal.

Senator Cook: No. You appeal only if you can show that there was an error made by the judge in law or in fact.

Senator Connolly: Let us carry it a step further. I have no pre-ordained conclusion about this, but supposing in the case under appeal the commission has made a finding of fact that is perverse, it is the conclusion from that perverse finding that disaffects you, is it not? In that case, does the appeal not lie to the Federal Court under section 28?

Hon. Mr. Ouellet: That is right, section 28 provides the right of appeal. Obviously the bill does not deny this right of appeal.

Senator Connolly: Are we talking about a very narrow point here?

Mr. Cowling: The fear is that it would be easy for a commission to word its judgment in such a fashion that it did not appear to be perverse, or did not appear to have that degree of perversity necessary to give the Federal Court of Appeal jurisdiction, yet there still might be grave error. Courts of appeal generally, of course, will not look at the facts.

Senator Lang: Is that not a danger inherent in all appeal procedures?

Mr. Cowling: Yes, except that courts of appeal will reverse on facts. I do not know that it is in any statute, but their self-imposed rule is usually that the error must be manifest. If you look at the Court of Appeal law reports in any one year you will find a substantial number of reversals on fact, where the Court of Appeal has found that there has been a manifest error. Yet I am not sure it could be said that the trial court in those cases had made its finding in a perverse manner.

Senator Lang: Whether a question of law or fact, I think judges can sometimes stretch that if they want to get on one side or the other very badly.

Hon. Mr. Ouellet: You were talking of another bill that seems to have a built-in appeal. I have one in mind, which is the anti-inflation bill, Bill C-73, which does have some appeal. However, when you go to the tribunal, which will have to review decisions made by the administrator, it will be seen that after the tribunal there is no other type of appeal than the appeal under section 28, which is exactly the same thing as with the Restrictive Trade Practices Commission.

The Chairman: That is not right.

Hon. Mr. Ouellet: I must say that we discussed this very thoroughly when drafting the legislation to ensure that this tribunal is on the same footing as the Restrictive Trade Practices Commission. There would be no appeal except under section 28 of the Federal Court Act.

Mr. Cowling: With a couple of exceptions, I think, Mr. Minister, in fairness. The Anti-Inflation Appeal Tribunal is an entirely independent body. It is not the same body as the Anti-Inflation Board, if I understand correctly; it has altogether different personnel.

Hon. Mr. Ouellet: The Restrictive Trade Practices Commission is also an independent body; it is not the same thing as under the litigation section of the department.

Mr. Cowling: I think there would be a similar situation if under the anti-inflation legislation the appeal was from an order of the administrator to the Anti-Inflation Board itself. It is the administrator who makes the orders under that legislation. There has been provision for three bodies in that bill. There is the board, which is the executive branch; there is the administrator, who makes the orders; then there is the Appeal Tribunal which is really a court. I think the distinction in comparing it with Bill C-2 is that there is really only one and not three, and they are all performing the same function.

Hon. Mr. Ouellet: I must say that we have exactly the same lines. There is the Anti-Inflation Board, the administrator, the Anti-Inflation Tribunal, and there could be an appeal under section 28. There are people who are doing the monitoring or inquiring, working in the Department of Consumer and Corporate Affairs.

Mr. Cowling: You are talking about combines now?

Hon. Mr. Ouellet: Yes. There is the director of combines, the Restrictive Trade Practices Commission and an appeal under section 28, exactly the same setup.

Mr. Cowling: I am afraid, with great respect, Mr. Minister, I do not agree.

Hon. Mr. Ouellet: Here we have the director, the administrator of the law, the Anti-Inflation Commission, the Pepin Commission, which is there with no real power except to monitor and make some information available, like our officers who are monitoring and studying cases. The Pepin Commission is making studies and if they find there is something wrong, that people are not following the guidelines, they refer it to the administrator. If our officers find there is something wrong, that people are not following the rules, the director of combines prepares a case.

Mr. Cowling: But he does not make any decision other than to go to the commission, and he does not make any order.

Hon. Mr. Ouellet: No. I grant you this difference. However, if you look at the various levels, it is the same type of appeal, or the same type of level.

Senator Connolly: Perhaps I could ask a question which perhaps does not go to the point. Is the chairman of the Anti-Inflation Board the same person as the administrator?

Mr. Cowling: No. The Appeal Board is entirely different.

Senator Connolly: Mr. Pepin is chairman of the board?

Hon. Mr. Ouellet: Mr. Pepin is chairman of the commission, which is there to make inquiries.

Senator Connolly: To monitor.

Hon. Mr. Ouellet: To monitor.

Senator Connolly: Who is the administrator? Has he been appointed?

Hon. Mr. Ouellet: No. The administrator will be a civil servant who will be appointed when the bill is passed.

Senator Connolly: Someone else than the chairman?

Hon. Mr. Ouellet: Yes.

Senator Cook: Are you receiving applications?

The Chairman: We have digressed. I have to take responsibility for having started it. What usually happens is what is happening here; we are trying to argue by analogy and we end up by not proving anything. The simple question is that in one of our reports we recommended that there should be the right of appeal to the Federal Court from a decision of the Restrictive Trade Practices Commission. This bill, in the form in which it is before us, does not reflect that. The answer we have been given for not reflecting that recommendation is that there is an appeal under section 28 of the Federal Court Act.

The further answer is made that section 28 of the Federal Court Act provides an adequate right of appeal. There are differences that have developed here today between your people and certainly the chairman's viewpoint and counsel's viewpoint.

Hon. Mr. Ouellet: To give a further right of appeal would entirely defeat the very purpose of setting up a tribunal with special expertise in the field of competition law.

Senator Connolly: In a very superficial way, the feeling I have is this: I am inclined to disagree with the chairman that the right of appeal is not broad enough to cover the cases that he discusses. I am also inclined to disagree with the minister . . .

The Chairman: You are going to have a hard time making a decision.

Senator Connolly: I am going to have more trouble than anyone else. I am inclined to disagree with the minister that, if section 28 is given its full effect, the Federal Court can, in fact, in its order or judgment substitute its own view of the facts or the law.

Senator Cook: This is a case, Mr. Chairman, when I am glad I do not know any law. I do not have to take any view.

The Chairman: I accept that with a lot of qualification. We have talked the subject out. We might talk longer on it, but I do not believe we would add anything more.

Hon. Mr. Ouellet: Mr. Chairman, could I reply to Senator Connolly?

The Federal Court could entertain an appeal under section 28, on the ground that the commission has based its decision on an erroneous finding of fact and that they made this decision in a perverse manner. Therefore, I think that is what you have in mind, Senator Connolly.

Senator Connolly: Maybe you have opened something for me.

Hon. Mr. Ouellet: The court may base its decision on an erroneous and perverse finding of fact, and then the fact would be looked at differently because the commission based its judgment on erreneous facts.

Senator Connolly: Could I say this: If, on the appeal to the Federal Court, the court decides that there has in fact been a misinterpretation of the facts, or a misapplication of the law, then what you say, Mr. Minister, is their decision is to refer the matter back to the tribunal for reconsideration?

Mr. Cowling: I do not know that they can do that.

Hon. Mr. Ouellet: It could be quashed.

Senator Connolly: They could quash the decision, or do you say they cannot quash the decision?

The Chairman: They can reverse the decision.

Senator Connolly: That is the way to say it. You say they cannot reverse the decision?

Hon. Mr. Ouellet: I say they do reverse the decision.

Senator Connolly: That is substituting their judgment for . . .

Senator Cook: Only because of erroneous facts.

Senator Connolly: Let us not complicate it by introducing further facts. I think I will just stop there and think about it.

The Chairman: There is one point which I do not propose developing at this time, but it arose the last day, and we were discussing it. I think Mr. Cowling has been talking with Mr. Bertrand about it. It was on the question of the second proclamation provided for in the bill in relation to services which are not presently covered by the existing law. This arose in connection with transportation. We were going to examine the situation to see if there is some way in which we could make use of that second proclamation until the whole question of regulated trades and industries is settled. That was the broad concept, and we have not resolved it yet. There still remains one question.

I gather that the minister was discussing this on the basis that there might be some way of dealing with the difficulties without amending the bill. There might be some step that could be taken to preserve the situation and preserve those who might otherwise be affected if a proclamation were given under the second proclamation, until the initial question of regulated trades and industries, and the position of the government as a matter of policy, was determined and reflected in some proposal that would be submitted to Parliament.

We have two questions. One is whether we go via the route of amendment, which until this moment has been the view of the committee, because we have proposed an amendment, or whether, as the minister has suggested, we find some way of reflecting our views and our concern on the subject short of an amendment, which will preserve the situation.

I can understand why you would prefer not to have the amendment route, because you have to go back to the House of Commons. Whether or not that will present difficulties I do not know, and we do not need to speculate on that at the moment. All I am speculating on is whether there is some way in which we can put on paper the situation we are trying to meet, in an effective way, so that until the provisions we agree on are dealt with the courses to be taken under them, when the bill passes into law, will not be used for any purposes related to regulated trades and industries under the prosecution sections. We have not reached a conclusion on that. We have got to soon, I can tell you that, because at least the chairman—being one member of the committee—has made up his mind that we are going to get a report out within ten days. We have no time to lose.

Hon. Mr. Ouellet: Mr. Chairman, with respect to any person whose agreement may be newly affected by the extension of section 32—that is, to services generally—the question of due proclamation is there to afford him the opportunity to put his house in order before the extension of section 32 comes to bear upon him. In deciding upon the date after which section 32 will apply to services generally, we shall consider what is a reasonable time to allow the service sector to make the necessary adjustments.

However, I would like to stress to the members of this committee two important things. First, section 32 makes by far the most important single contribution to the anti-inflation program. Secondly, when section 32.1 is brought into force in respect of services not now covered, the law makes it quite clear that it must come into force in regard to all services at the same time. As I am sure you will appreciate, there can be no undue delay with respect to one and there can be no distinguishing among different services. As now drafted, subsection 31.2 permits no such distinction, and so it would be directly contrary to what we have said, namely, that we would like at one time to bring all of the services under the umbrella of the Combines Investigating Act. But we have acknowledged that it could come at a later date in order to give time to those who are affected to prepare themselves to live under the act.

During the preparation of the bill officers of my department discussed this issue at length with officers of the Ministry of Transport. As a result of the discussions which have taken place in this committee, our discussions with the officials of the Ministry of Transport have continued and have even accelerated. And on that point I wish to give your committee due credit for its assistance. I am quite confident that within the parameters of what we consider to be a reasonable period of abayance of the revised section 32, a conclusion can be reached by the Canadian Transport Commission as to whether the regulations under the Aeronautics Act should be amended to make clear that the Canadian Transport Commission is to accept full responsibility for any schedules which are filed and accepted by it, and that the air lines may co-operate in arriving at tentative common schedules, or whether the air lines are expected to act independently in respect to such filing. I believe we will be able to progress in these discussions in time before we promulgate section 32.

The Chairman: Except that there is a time factor in this, if this committee insists on its amendment because the matter is not going to be settled. The committee has proposed an amendment to exempt from the application of the service sections of this bill the situation in relation to IATA and the air line companies in Canada. We cannot lose the effectiveness of that opportunity to raise that issue in the only effective way there is, which is by persisting in our amendment, unless the alternative course has been concluded. That is why the problem is: "How soon?" If we report this bill without amendment, we then lose any opportunity to deal with that subject.

Hon. Mr. Ouellet: Mr. Chairman, an amendment would, of course, put the transportation companies in a unique position. In fact, in the interests of the public it might not settle the situation adequately. I believe the Act as it is puts pressure on both the CTC and the companies to bring about an appropriate settlement of the situation, because it puts pressure on them to clarify the situation.

The Chairman: But then we are putting pressure on you.

Hon. Mr. Ouellet: Mr. Chairman, to put pressure on me may not be unjust so far as I am concerned, but it seems to be unjust with respect to groups which could very well say that this bill as amended gives preferential treatment to the air line companies. They may well ask, "Why not give us that, too?" Why not? Because, as I have said before when appearing before this committee, there are many other groups which will be eager to get the same type of treatment.

The Chairman: There are many groups which have it already.

Hon. Mr. Ouellet: Yes, and I must say that at the last meeting you pleaded their case quite eloquently. I would say that if I were an air line I would not be scared at all and I would not ask for this exemption because I would feel that I already had it. It seems to me quite clear that the air lines have already had an exemption because, according to them and if what they say is true, they are a regulated industry covered completely by the CTC. In that case, then, they come within the embrace of the McRuer formula. As you know, Chief Justice McRuer put it quite clearly in the Canadian Breweries case. For the benefit of the committee I might just refer to Chief Justice McRuer's judgment. He said that when a provincial legislature has conferred on a commission or board the power to regulate an industry and fix prices, and the power has been exercised, the courts must assume that the power was exercised in the public interest. In such cases, in order to succeed in a prosecution laid under the Combines Investigation Act with respect to the operation of a combine, the judge said that "it must be shown that the combine has operated or is likely to operate so as to hinder or prevent the provincial body from effectively exercising the powers given to it to protect the public interest."

It is quite clear, of course, that the same principle applies to an act of Parliament. I submit, therefore, that the air lines are saying that they wish to take advantage of the present occasion to seek a clear-cut exemption from the Combines Investigation Act for all of their activities. In justification of that they are arguing, or people are arguing

for them, that they are in fact regulated by the CTC under the Aeronautics Act. They argue that the CTC does not merely accept their proposed rate schedules but examines them critically in the light of the authorities and may disallow or substitute other rates. In other words, the CTC assumes the responsibility for the rates which they adopt. If this be so, it appears to me that the air lines have brought themselves within the McRuer formula.

I must say, Mr. Chairman, that at the last meeting you most eloquently expressed the type of defence which could be brought in if there were ever a prosecution. And that defence, I submit, would be a useful line of defence for these companies. I can see that the companies do not want to hang their hat on this alone. They would rather have a clear-cut clarification of the situation. In answer to that I say: Very well, let us work towards this. I think it could be justified. Let us have the CTC clearly give them this assurance, however, and not take the other route—that is, by giving an exemption under this act that would inevitably be asked for by many other regulated groups.

Senator Connolly: Suppose there were an investigation of the air lines' practices, and a charge laid as a result of a violation of this act. In your opinion, would it be sufficient for the air line companies to come in and say, "For the reasons we have given in connection both with IATA and our domestic schedules, which we have submitted to the CTC, we are a regulated industry, and are exempt"? Do you think that would exonerate them?

Hon. Mr. Ouellet: Well, I cannot pass judgment on this. I suspect that the reason why the air lines are asking for this exemption here is that they are not thoroughly satisfied with the activities of the CTC. Rather than seeking this unique and specific exemption, they should be taking the other route and clearly submitting their rates and activities to thorough study by the CTC.

Senator Connolly: We raised the question earlier.

The Chairman: I did not intend to prolong discussion of this matter. We did go over it all at the last hearing. I must say that I came away from the last hearing, and the contribution you made to it, Mr. Minister, with a pretty clear understanding, that seems to have been somewhat departed from in the course of what you have said now.

Hon. Mr. Ouellet: No, not all.

The Chairman: We were not going to take any responsibility. What we said was that the air lines and IATA had come to see us, and that we had their evidence. We have read and studied the law under the National Transportation Act, the Aeronautics Act and the regulations thereunder, the *Canadian Breweries* case, and Board decision of the Supreme Court of Canada.

Exemption from the Combines Act was the route that was followed heretofore in dealing with the Shipping Conventions, where the director of prosecutions under the Combines Investigation Act had taken proceedings against the Shipping Conference, and had made his report to the Restrictive Trade Practices Commission. There was a full-scale hearing, and the conclusion was that the Shipping Conference was operating a cartel but that it was in the public interest, and following that the government of the day, back in 1970, introduced a bill called the Shipping Conferences Exemption Act to exempt the operations of the Shipping Conferences from the Combines Investigation Act.

In the Railway Act you have exemptions too. This is another form of transportation. Since it was suggested to us in the course of our discussions with your officials, however, that some day your department hoped or expected—some language of that kind—to "revisit" the McRuer decision, I concluded that that meant that some day there was going to be an issue. These people came in and made their presentation and the committee decided that there was excellent precedent for providing an exemption. It had been done by the government for the railways and for the Shipping Conference, and therefore we provided an amendment.

The minister would like to get his bill passed without amendment. I do not blame him for that. There are many reasons, perhaps, Mr. Minister, why you should have it without amendment, but we have to recognize the logic of the situation of the air lines and the participation of the government in the responsibility for it; because here you have the Ministry of Transport and the Department of Consumer and Corporate Affairs, and between the two of them are they going to let this situation be such that problems will develop, or as a result of which prosecutions may be initiated? That is why these people appeared before us, and we felt that they were entitled to an exemption.

We settled on the exemption alternative because it seemed to be an acceptable one. There are many other ways of doing it, of course. If the government would amend the Aeronautics Act—which of course it is not within our power to do, since it would have to be initiated in the other place—and put specific language in it to fix tariffs and tolls, then that would solve the whole problem. We, however, do not have control of that situation. We do have control of this situation, though, by way of exemption. If there is a way that we can accomplish the assurance—internationally, particularly, where the government of Canada is a party to these agreements—of selecting this way of fixing air line rates in the accepted form, then we should do so. If the government is not prepared to do something about it, maybe it is about time, when we have an opportunity, that we should do so here. This is all we are trying to do. If you can come up with an answer for us, I am sure the committee, if they are satisfied with it, will not insist on the exemption.

Senator Connolly: I have never heard a case put any more clearly. I think that is a masterly statement of what our situation is.

The Chairman: Well, there you are. We are ready, willing and able.

Hon. Mr. Ouellet: All right. I undertook at the last meeting to sit down with you and work on an acceptable wording. For various reasons it was impossible for us to meet, but, if it is the wish of the members of the committee, I would welcome a working session with your chairman. Perhaps it could be a short one. That might resolve these questions. There is no doubt that I fully understand the importance of clarifying this situation. The exception that was presented, concerning the Shipping Conferences' Exemption Act, to a certain degree, is a precedent; but I must remind you that this act is a temporary one. It is a measure that will expire in September, 1979.

The Chairman: You must remember, too, that the act, in terms of its provisions, expired at the end of 1974. The government made a decision then, and by proclamation they extended it to 1979. It would therefore appear that they have fortified their original decision by proclamation.

Hon. Mr. Ouellet: You have brought in a point which is a very good one and I may tell you that I am preparing my own people to come to a clearer understanding with officials in the ministry of Transport on the issue. I will do my utmost to satisfy the members of this committee as to the outcome of the decision.

The Chairman: You know that there is a very simple way to accomplish this. I am not legal counsel for any group that might be involved in this matter. I am not pleading a case for anyone. The regulation giving power to the CTA to function in the matter of tariffs and tolls, however, is a regulation passed under the Aeronautics Act. Now we know that there is power to make regulations, and those regulations can be made by the Governor in Council. So if there is a regulation now in force under the Aeronautics Act, where the federal field is absolute, then the Governor in Council can revise that regulation.

Hon. Mr. Ouellet: But the difficulty there, Mr. Chairman, is that we, in fact, are pressing the Canadian Transport Commission to render a decision and a judgment that I understand is not finalized. The CTC will have to decide whether all the activities of air lines could properly be subject to co-operation or agreements, or whether some should be subject to co-operation or agreement while others are subject to the marketplace and competition. By this request you are pressing for a decision on this, and I am not the person who has to take that decision. I am not the Minister of Transport, so I am sure you appreciate the difficulties that I am encountering. However, I will try in the coming days to sit down with you and explore a wording that would fit in with the thinking of the members of the committee.

The Chairman: Well, we can get together Tuesday, Wednesday or Thursday of next week, and within reasonable limits I will give you your choice of time. But the temper of the committee, as I interpret it, is that this is the time to do something, and we can only do something within the limits of the authority we have. We cannot introduce an amendment to the Aeronautics Act and expect to have an assurance that it will become law or even have an assurance that the Governor in Council will draw up an amending regulation. But it will be quite easy for him to do if the will to do it were to develop.

Hon. Mr. Ouellet: All right.

The Chairman: So, as I have said, next week we have a choice of three days, Tuesday, Wednesday or Thursday.

Hon. Mr. Ouellet: I will let you know as soon as I can.

The Chairman: Thank you.

The committee adjourned.

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1974-75

THE SENATE OF CANADA

PROCEEDINGS OF THE

STANDING SENATE COMMITTEE ON

BANKING, TRADE AND COMMERCE

The Honourable SALTER A. HAYDEN, *Chairman*

Issue No. 67

TUESDAY, DECEMBER 2, 1975

Second Proceedings on:

«The *Subject-Matter* of Bill C-73, Anti-Inflation Act»

(Witnesses: See Minutes of Proceedings)

29819—1

THE STANDING SENATE COMMITTEE ON BANKING, TRADE AND COMMERCE

The Honourable Salter A. Hayden, *Chairman*

The Honourable Senators:

Barrow
Beaubien
Buckwold
Connolly
(*Ottawa West*)
Cook
Desruisseaux
Everett
*Flynn
Gélinas
Haig
Hayden
Hays
Laird
Lang
Macdonald
(*Cape Breton*)
Macnaughton
McIlraith
Molson
*Perrault
Sullivan
Walker—(19)

**Ex officio* members

(Quorum 5)

Order of Reference

Extract from the Minutes of Proceedings, November 18, 1975.

The Honourable Senator Langlois moved, seconded by the Honourable Senator Perrault, P.C.:

That the Standing Senate Committee on Banking, Trade and Commerce be authorized to examine and report upon the subject-matter of the Bill C-73, intituled: "An Act to provide for the restraint of profit margins, prices, dividends and compensation in Canada", in advance of the said Bill coming before the Senate, or any matter relating thereto; and

That the Committee have power to engage the services of such counsel, staff and technical advisers as may be necessary for the purpose of the said examination.

After debate, and—
The question being put on the motion, it was—
Resolved in the affirmative.

Robert Fortier,
Clerk of the Senate.

Minutes of Proceedings

Tuesday, December 2, 1975
(87)

Pursuant to adjournment and notice the Standing Senate Committee on Banking, Trade and Commerce met this day at 2:30 p.m.

SUBJECT:—"*Subject-matter* of Bill C-73, Anti-Inflation Act".

Present: The Honourable Senators Hayden (*Chairman*) Barrow, Buckwold, Connolly, (*Ottawa West*), Cook, Desruisseaux, Flynn, Laird, Lang, Macnaughton and McIlraith. (11)

In Attendance: Mr. C. Albert Poissant, Consultant to the Committee.

The Committee proceeded to a detailed examination of the above Bill assisted therein by Mr. Poissant.

At 4:30 p.m. the Committee adjourned until 9:30 a.m., Wednesday, December 3, 1975.

ATTEST:

Frank A. Jackson,
Clerk of the Committee.

The Standing Senate Committee on Banking, Trade and Commerce

Evidence

Ottawa, Tuesday, December 2, 1975.

The Standing Senate Committee on Banking, Trade and Commerce met this day at 2.30 p.m. to consider the subject matter of Bill C-73, providing for the restraint of profit margins, prices, dividends and compensation in Canada.

Senator Salter A. Hayden (*Chairman*) in the Chair.

The Chairman: Honourable senators, we have with us today as our witness Mr. Albert Poissant. I think that this may well be the last meeting we will have on the subject matter of the Anti-inflation White Paper because it is quite possible that the bill itself will come to the Senate this evening. If it does not, then it certainly will tomorrow. I imagine the second reading stage will be dealt with tomorrow or Thursday, and the bill itself will probably be before this committee some time next week. It may also be that in the bill itself the situation may have crystalized itself somewhat. I gather, and I am sure that it is fairly common knowledge now, that the Christmas recess is supposed to start on December 19 and that when we come back, which is expected to be about the end of January, we will be starting a new session. That makes it doubly important that we should get Bill C-2 out of the way as soon as possible. It has been under consideration long enough, and now there seems to be a sort of correlation with the anti-inflation program, and I do not want to create a situation, by holding up Bill C-2, where it can be said that we are interfering with the anti-inflation program.

The only other comment I want to make before I call on Mr. Poissant is that, as you have been reading in the papers, the teachers from Toronto have been down here and have been very much stirred up by the so-called decision of the Anti-inflation Board. I was concerned about it myself indirectly as to the question of the authority by which a board which is not a decision-making board under the bill could annouce a decision. But when I looked into it, I discovered that in the bill there is also provision for the board to have all the powers under the Inquiries Act, and I think the board takes the position that, until such time as the legislation is passed, and until such time as the agreements between the provinces and the federal authority are entered into, all of which is provided for in Bill C-73, they will exercise their authority under the Inquiries Act. So I went back and read the Inquiries Act again—and it is not the first or second time that I have read it—and I found that the authority there is quite broad. I think this was brought out in a release that the Anti-inflation Board gave to the Metropolitan Toronto teachers as to the source of their authority in the meantime. They are attempting, the statement said, to put themselves in the position of the Anti-inflation Board being a legally constituted body and the agreements with the provinces having been entered into. Then, at this point in time and before these things happen, they try to make a decision as to what the conclusion of the Anti-inflation Board might be if and when it is able to function under Bill C-73, and they try to interpret the circumstances in that way. Well, honourable senators, I suppose that is all right if you can do it. Being from Toronto, Senator Lang, you may not yet have been contacted by the teachers, but most of us have been and I think you can look forward to it. What you might say about it, I do not know. I am not running for office!

Senator McIlraith: Mr. Chairman, did you have occasion to look at the method of appointment of the members of the board? How are the members appointed, or is there anything unusual about their appointment? Is it an Order-in-Council appointment giving them powers under the Inquiries Act?

The Chairman: Yes.

Senator Cook: Is it not rather an "Alice in Wonderland" situation? There is no board until the act is passed, so they cannot act under any act.

Senator McIlraith: It would be impossible for the government to appoint commissioners under the Inquiries Act by Order in Council, because that is an Order-in-Council appointment. So I am wondering if that has been done. Perhaps I did not make my point clear in the beginning.

The Chairman: We can check on that, but the chairman has even made reference to that in a public statement, and perhaps it would be a good idea if I were to read the statement to you because it is short. It is dated November 20 and is on the letterhead of the Anti-inflation Board. The heading is "Toronto Teachers Dispute" and the document describes itself as being a news release. The text is as follows:

> In a meeting requested today by representatives of the Metro Toronto School Board, senior staff of the Anti-Inflation Board received an informal briefing on the views of the School Board on the Toronto secondary school teachers dispute.
>
> To ensure that it is fully aware of the views of each party in the dispute, The Anti-Inflation Board is inviting both parties to prepare written submissions explaining their current positions with regard to compensation-related issues in the dispute. They will be asked to submit information to justify their positions in relation to the guidelines of the Anti-Inflation Program.
>
> The Board's action marks a departure from the standard operating procedure it has indicated it intends to follow.
>
> On November 7th, the Board issued a general statement on its relationship to collective bargaining. In that statement, the Board said that it did not intend to replace normal bargaining processes. However, the Board also indicated that in situations where an impasse has been reached, the Board would be pre-

pared to offer clarification of gounds for special consideration under the guidelines.

Any request for special consideration will be closely scrutinized. The judgment of the Board will be influenced not only by the merits of the particular case, but also by the possible impact of the resulting settlement on the successful implementation of the anti-inflation program as a whole.

Hon. Jean-Luc Pepin, Chairman of the Anti-Inflation Board, indicated today that the objective in receiving submissions from the parties in the teachers' dispute will be to clarify how the Board will treat the situation once the anti-inflation legislation has been passed by Parliament and once the appropriate federal-provincial agreement has been concluded.

This is what I describe to you, that by some sort of magic they project themselves forward now and conclude what their decision may be when they are clothed with full authority. Then the closing paragraph is as follows:

> Until the legislation is passed, the Anti-Inflation Board is acting under the Inquiries Act.

Senator Flynn: It would be interesting to understand how they act under the Inquiries Act. Where do they get that authority or basis for acting?

The Chairman: I have just sent for the text. Under the Inquiries Act there is a wide range of powers.

Senator Flynn: Their appointment was made under this act pending the passage of Bill C-73, is that it?

The Chairman: The only thing I do not know at the moment, although I am checking it, is how they have been appointed under the Inquiries Act. There are provisions in the Inquiries Act under which they could be so appointed. Whether they are called a commission or the Anti-Inflation Board, that would not rob them of the authority to deal with it.

Senator Flynn: They could express an opinion but not make decisions.

The Chairman: I would suspect that, first of all, a minister has this authority under the Inquiries Act, as we will see a little later. Certainly the Governor in Council would have authority. Whether or not they have done it that way, I do not know.

Senator Cook: Clause 13(1) of the bill says:

> The Anti-Inflation Board and each member thereof has and may exercise all of the powers of a person appointed as a commissioner under Part I of the *Inquiries Act*.

Senator Flynn: They cannot do that before the passage of the bill.

The Chairman: It is not yet law.

Senator Cook: That is the point.

The Chairman: Therefore, authority must be found in the Inquiries Act.

Senator McIlraith: My recollection is that under the Inquiries Act there are two methods of transmitting power to a person or a commission: one is by Order-in-Council appointment; the other, curiously enough, is by ministerial appointment. I do not know which method has been used.

The Chairman: Under section 2 of the Inquiries Act:

> the Governor in Council may, whenever he deems it expedient, cause inquiry to be made into and concerning any matter connected with the good government of Canada or the conduct of any part of the public business thereof.

Then there are subsequent sections dealing with the appointment of commissioners.

Senator Flynn: Their appointment would have to be pursuant to this provision of the act. If their commission does not refer to this act, if they are appointed pending the passage of Bill C-73, they have authority at all presently; they have delayed authority.

Senator Lang: It is merely an opinion expressed.

The Chairman: I can see that if the Governor in Council appointed a commission to be called the Anti-Inflation Board and assigned to it all the powers and authorities enumerated in Bill C-73, that is a valid exercise of authority under the Inquiries Act. However, we are not called upon to make that decision.

Senator Flynn: It would be misleading, or at the least would create confusion.

The Chairman: When you try to do things in a hurry . . .

Senator Flynn: Improvising.

The Chairman: —or when you are improvising, you have to use whatever instruments are at hand.

Senator Flynn: We have seen that before. I am not surprised. We can be scandalized without being surprised.

Senator Cook: It seems to me that the teachers have a good case for appealing to the Federal Court under that order.

The Chairman: Except at the moment the question is, if we are looking for any rights we will have to find them under the Inquiries Act.

Senator Flynn: An inquiry is not the authority to give directions or opinions.

The Chairman: As a commission under the Inquiries Act, yes, they would have authority.

Senator Flynn: To do what?

The Chairman: They can investigate and make decisions within the authority given to them.

Senator Flynn: But with regard to the conduct of an investigation, if the bill is passed and if the guidelines are confirmed by the government under this bill, then the problem will be solved in one way or another way, but it is rather hypothetical.

The Chairman: In the meantime, you are using what you think are the instruments at hand.

Senator Flynn: In about ten days the doubt will be dispelled.

Senator Lang: It is academic.

The Chairman: The teachers' dispute is limited to Toronto; only Toronto senators have a particular concern in that, but the telephone does ring fairly frequently. Senator McIlraith, did we get to your point?

Senator McIlraith: Yes, I think the point has been covered.

Senator Cook: I hope your former teacher, Mr. Chairman, it not on the picket line.

Senator Flynn: What are you insinuating?

Senator Cook: The chairman was talking about the telephone ringing.

The Chairman: Mr. Poissant, you had gone a certain distance last time. Would you please continue?

Mr. C. A. Poissant, Advisor to the Committee: Mr. Chairman, honourable senators, I really do not have much to add at this time. I did confine my notes last time to the information then available. Unfortunately nothing new has arisen; so it is again with reservations that today's comments are made. The chairman has tried to get the draft regulations, or part of them, but was unable to obtain them. Perhaps I might further clarify some of the comments I made last week.

Senator Desruisseaux asked how Canadian companies would be treated when they do both export and import, and how they would fix their prices. The answer to that is to be found in the draft guidelines submitted by the board, which say that a company will be expected to sell abroad at inernational market prices, and of course sales in non-arm's length transactions will have to be at fair market value. If he also supplies the domestic market, the prices must be set according to the cost pass-through rule. You will remember I said last week there were two methods of arriving at the selling price, either the cost pass-through method or the net margin rule. But an exporter must use the cost pass-through method in arriving at the selling price, according to the guidelines. Finally, the combined revenue (on export and domestic) cannot exceed 95 per cent of his net margin average of the last five years.

Senator Flynn: But that is not the case if he uses the price in force at the time of the coming into force of the legislation. The result is not important if he does not raise his price.

Mr. Poissant: Very true. It is only to the prices increased after October 14, 1975. However, it could happen that exporters and those who are selling on the domestic market could have two prices, which would be a departure from the fixed pricing that is normal throughout the country.

Senator Flynn: But it affects only the upward changes in price.

Mr. Poissant: Yes, and only after October 14.

Senator Connolly: Just a moment. Do I understand the answer to Senator Flynn's question is that if you are in the export market your starting price can be 95 per cent of your average for the previous five years or can in fact be the price which prevailed on the date the program came into effect?

Senator Flynn: I would think so.

Senator Connolly: Is that so?

Mr. Poissant: That is true for the domestic price, yes, but for an international price you must abide by that price.

Senator Flynn: Even if yours was higher?

Mr. Poissant: For the domestic price you have one method available to you, and that is the cost passthrough method, remembering again, as Senator Flynn has said, that it is only to be applied to those prices after October 14, 1975. If there is no increase in your cost, you must use for the domestic price the price available on the 14th of October.

Senator Flynn: As well as the price for export.

Mr. Poissant: Yes.

Senator Connolly: In the event that your export price advances, there is to be a levy, I understand. That levy is to be upon what—the increases over the price figure based on that 95 per cent of the average for five years?

Mr. Poissant: Well, the answer is provided in this note here, which says that finally, if you can demonstrate that it is impractical or harmful to Canada to price domestic sales at other than export prices—the best example I can think of is newsprint paper. Usually the price of newsprint is fixed at the New York price, and the domestic price takes into account a fixed discount from the New York price. All the newsprint companies use that international price. If, because of the cost pass-through method, they were forced to use a lower price than this formula which is the pattern for the industry, the government would say, "All right. Use the international price with the discount factor to arrive at your domestic price, but, if this gives you more than 95 per cent when combined, then the excess of that will have to be refunded." And they will call this, as you say, Senator Connolly, a special levy. All your profits in that event would be subject to the special levy. That is the answer given in the initial guidelines.

Senator Flynn: What do you mean by "special levy"?

The Chairman: The refund.

Senator Flynn: To whom?

The Chairman: It goes to the government.

Senator Flynn: You have a new definition of "tax," then.

Senator Connolly: I think so.

The Chairman: It is a question of the connotation of "levy."

Senator Connolly: It is not a tax; it is a confiscation.

Senator Flynn: What do you think a tax is?

Senator Connolly: Yes, except that you have a scale for taxes. This one has everything.

Mr. Poissant: To answer your question, there is no answer available as to how this will work or what the special levy will be. It says only that any excess of revenue which you derive because you have used an international price on the domestic market might be subject to the levy. In other words, if this creates an excess of revenue over the aggregate 95 per cent of the last 5 years' net average income, that excess will be subject to special levy; but they stop there without giving us an explanation of what a special levy is.

Senator Flynn: It is not spelled out in the bill?

Mr. Poissant: No. This is in the guidelines.

Senator Flynn: Do you think the bill would hold out enough authority to the government by simple regulations to say that if you act in the way you have just described you will have to refund—not refund, because the government has not dispersed anything—you will have to pay to the government the excess of your income resulting from that increase in price?

Senator Connolly: On the foreign market!

Senator Flynn: I do not care about that.

Senator Connolly: Let us take a concrete example. Say you have a producer in Canada who sells only on the export market. All right, he is not subject to any of this cost pass-through method; he is subject to the domestic price at the date the program starts either. All he is subject to are the variations in the price on the international market abroad or offshore. What then is the measuring stick? Where is the levy going to be made? Suppose his article sells for $1 on the export market and one year after the program starts it is up to $2, does that mean he has to turn that extra dollar over to the Crown? Suppose in the third year, instead of the price being $2, it falls to 50 cents, what then happens to him? Is there any averaging forward for prices?

Mr. Poissant: No, there is no provision for averaging prices.

Coming back to the first part of your question, Senator he might be entitled to an increase, if his average selling price did not give him a profit in the previous year. Secondly, if the profit in the first year of the new bill is within the 95 per cent margin . . .

Senator Connolly: Oh, that is the test. I neglected to mention that.

Mr. Poissant: Then he would be entitled to his increase.

Senator Connolly: His starting point is 95 per cent of the average for the five years before the program. All right. If it goes up from that he refunds the difference to the government.

Mr. Poissant: That is what I gather, because it says that if you are on the export market and if that brings you more than 95 per cent of your average profit because of the increase in the selling price and because of the increase in the export market price, or international price, that excess revenue apparently, from my reading of this guideline, will be refunded, or will be subject to what they call the special levy.

Senator Flynn: It will be "refunded"? The word is badly chosen, I would suggest. Would you not suggest that the government might be inclined to let people do that to increase its revenues?

The Chairman: It will have to be repaid to the government.

Senator Flynn: But the government is going to get the benefit of that.

The Chairman: Oh, yes.

Senator Flynn: So, if people adhere to the rules the government will not see a cent. If somebody goes beyond the rules the government will then profit, so is there a sort of incentive to the government to let people go outside the rules?

Mr. Poissant: Actually, we do not have the answer with regard to that special levy, nor have we the answer as to how it is going to work. It is possible that in the regulations the special levy may just be set aside in the company.

Let us use your example, Senator Connolly. Suppose there is in year three a loss or a reduction in the selling price. It might be unfair to raise a special levy in year one, and at the same time, in year two or year three the Company suffers a loss. With regard to the special levy we have no indication, as stated in the guidelines, of how it is going to work at this time.

Senator Cook: If the government confiscates excess profit, will they also charge income tax on it?

Senator Flynn: I hope it will be allowed as an expense, in order to earn income.

The Chairman: It would be a deductible expense.

Senator Connolly: Does it come off before they pay tax, or what?

I suppose there is another problem for companies, and that is that if a company has to average its price for the previous five years, during which it might have had very good years and very bad years, is there any indication that there should be some test other than a straight average of the previous five years?

Mr. Poissant: The answer given to that question by the minister was, first of all, that a spread of five years was used because it was felt that 1970 and 1971 were bad years, 1972 was a year that was just about stable, and 1973 and 1974 were very profitable years for industry as a whole. Everything being equal, even taking losses into account over a five-year period should not produce too bad results for the average industry.

Senator Flynn: During the war, Mr. Poissant, all prices were frozen, if my memory serves me correctly, as of November 11, 1941, and there was an excess profit tax which meant that what you earned over a certain amount would be paid in tax.

The Chairman: That is correct.

Senator Flynn: Of course, there were some adjustments. Do we know now if this is really the policy? This is not an excess profits tax you are referring to.

Mr. Poissant: No, and the special levy, we must remember again, affects only industry in the exportation field.

Senator Flynn: In the domestic field also.

Mr. Poissant: They have to be in the exportation field to start with. For local industries or strictly domestic industries, there is no special levy.

Senator Flynn: What is the penalty?

Mr. Poissant: Well, as we explained last week, there are four courses of action available. First of all, the administrator may decide to advise the company to stop raising its prices. Secondly, it may be requested to return the excess price to the consumer, if it is possible to identify him. Thirdly, if it is not possible to identify the consumer to whom the excess price was applied, the company concerned may be obliged to make a general reduction of its prices.

Senator Flynn: Are you referring to a reduction of prices to the consumer generally, in order to offset the illegal profit?

Mr. Poissant: Well, the excess revenue that is obtained. Fourthly, if it is not possible to use any of the first three options, the administrator may ask the company to refund the excess to the government.

Senator Flynn: But the levy is there too.

Mr. Poissant: This is not called a special levy under the law.

Senator Flynn: Well, whether it is called a special levy or not does not matter if the result is the same.

Mr. Poissant: This is explained in the bill. Whereas the Special levy is not provided for in the bill, it seems that it will be in the regulations themselves; but the special levy, again, only applies to the export and import fields. You have to have export sales in your enterprise to be subject to the special levy; otherwise you are subject to the provision set out in clause 20 of the bill.

Senator Flynn: As you mentioned, also, it may not be possible to use the other options.

Mr. Poissant: If it is not possible, then the administrator may direct that the excess be paid to the government.

Senator Flynn: You mean that in the domestic market the administrator may direct three things to be done, and if none of them is possible, then there will be an application of the special levy. In the end there will always be the levy, either in the domestic market or in the export market. Of course, in the export market you cannot direct a refund to the consumer, and you may very seldom find it practical to order a reduction in price.

Mr. Poissant: That is very true.

Senator Flynn: Especially in the foreign market. It would be stupid. In the end, the practical penalty will always be the levy, which will benefit the government as a result of the illegality of any decision or as a result of the fact that someone is going against the guidelines.

Mr. Poissant: You are right. As I say, companies in the export market and companies in the domestic market have been treated separately. For those companies that are exclusively in the domestic market a mechanism has been provided for dealing with excess revenue, whereas in the export field no details of how the special levy will work have been given.

Senator Flynn: I want to make it clear that I am not criticizing you, nor the legislation, but I find it fascinating.

The Chairman: That is a pretty good word.

Mr. Poissant: There was another question asked last week, Mr. Chairman, on the matter of profitable and loss items. I will repeat the question I have here, which more or less resembled a question that was asked of me last week. In going over my answer, it occurs to me that perhaps the answer was not entirely complete. Here is the question I have in mind: "We are unable to use the cost pass-through rule for pricing, and are using the percentage pretax net margin rule. However, we have two areas in which we are phasing out activities due to new government standards. We are "selling these goods at a loss, and are no longer manufacturing these items. Should the loss from the sale of these goods be excluded from the average net profit margin calculation, as they are not a part of regular operations, can the loss be excluded in determining the five-year average margin calculations?"

The answer is: "No. In calculating the new average percentage pretax net margin, and in calculating the prices which will be allowed during the program, firms must use the same accounting procedures."

I said that last week. In other words, if, in your last five years you had some loss items and some profitable items which, combined, still gave you a profit of a dollar, in year one the maximum profit you can obtain is 95 cents, because of the 95 per cent net after tax margin, even if you do phase out a loss item. So that is the situation that may well come about. In other words, if the previous year you had those loss items and you calculate that you had a dollar profit before taxes, then you cannot exceed your profit in year one or after the program comes into effect by more than 95 cents.

Senator Flynn: It is only if you want to increase your price above what it was as of October 14, 1975. It is only to calculate an increase in your costs when you want to apply and say, "I want to sell above the price as of October 14, 1975, and I want to show you that I am losing money." They will not take into account the loss you made on certain items that you wanted to get rid of.

Mr. Poissant: No, they will not take that into account.

Senator Flynn: I agree. So it is only to calculate the increase in price that you are seeking.

Mr. Poissant: Yes, but remember, Senator Flynn, if my average losses and profit still give me an excess profit of one dollar, in other words, if my total profits are in excess of one dollar over my average losses for the last five years, then if I get rid of the losses in year one of the program I could still obtain a 95 per cent net margin by raising my price, but that they will not permit me to do.

Senator Flynn: I appreciate that, but I want to point out that this bill is not concerned principally with excess profits or marginal profits. It is concerned with the level of price, and the problem of excess profits only enters into the picture when you want to add to your price as it stood on the freezing day, that is October 14, 1975. It is only in this context that you look into excess profits. Otherwise, if you are satisfied with your price as of October 14, 1975, and if next year you make additional income or profit, there would not be any levy.

Mr. Poissant: As long as the price remains the same.

Senator Flynn: Excess profits only enter into the picture if you want to increase your price. We have to keep that in context, otherwise we are going to be concerned with excess profits legislation, which is not the case.

Senator Cook: If it was concerned with excess profits, then sometime you might be compelled to lower your price; and that is not in the picture at all.

The Chairman: The only way you could make more money would be by increasing your volume and maintaining your cost level.

Senator Flynn: Or by decreasing your cost, if you can.

Senator Cook: The cost of your raw materials might go down, but you are still not compelled to reduce your price.

Mr. Poissant: If your costs go down, then there is provision in the act that you must reduce your price. There is only one exception where you do not give a price reduction. It is when the gain is the result of unusual productivity resulting from the efforts of the firm, as we explained last week, major capital improvement of the company or a new technology used. But, using your example, if there was a reduction in price of the raw material, then you must pass this reduction along to your consumer. It is not only the increase they are after, but they are also after price fixing, and limiting increases to your actual additional cost. But if you have any reduction in cost, then you must reduce your price accordingly.

Senator Flynn: Will you give us the reference in the guidelines or in the bill for that? It is probably in the guidelines. The bill is a blank cheque in a way.

Mr. Poissant: I will give you the reference in the guidelines.

Senator Flynn: Is there any provision in the guideline for the situation where there is a decrease in the rate of inflation? Is there provision for decreasing salaries?

Mr. Poissant: No, that only affects the selling prices and the net profit, but not the compensation. In compensation there is only one way that you are limited to the increase. With regard to prices there is a question here which is as follows:

> In what circumstances may firms be required to make price reductions?

And the answer given is:

> Firms may be required to make price reductions in the event (1) firms under the cost pass-through rule who experienced declines in unit cost . . .

That is if your cost of material has declined . . .

> (2) Firms under percentage net profit margin rule experiencing an increase in percentage pre-tax net margin.

In other words, if your net revenue under your second method is more than 95 per cent of the average, then you must reduce your price. There is an exception to this which I mentioned last week where in special circumstances you do not have to reduce your price.

Senator Flynn: Does that apply to events after October 14, 1975? Let us say that on October 15 you have a price of one dollar and then, because you could prove an increase in cost, you were allowed to increase your price to one dollar and 15 cents. Then the following year if you were able to increase your productivity you might be ordered by the commission to lower your price to one dollar and ten cents. But could you be ordered by the commission to lower your price to below the level as of October 14, 1975? In other words, if, on the basis of my experience during 1975, I was able to increase my productivity in 1976 and I had more profit, could I be ordered by the commission to lower my price? It does not say that, but I doubt it very much anyway.

The Chairman: But that could occur because your cost level had gone down.

Senator Flynn: I can understand that this may happen, but is it the intention of the bill to force you to reduce the price below the level of October 14, 1975?

Mr. Poissant: In fact, yes, because of the method you are using. You cannot have in excess of 95 per cent over the previous 5 years' average net profit. So if because of an increase in volume you have an increased profit, which increased profit is over 95 per cent of the previous year's profit, then you must reduce the price.

Senator Flynn: Again, you are falling into the vicious circle that I was trying to underline, and that is that this bill is not a bill to control excess profits, but to maintain prices. I cannot see that you could go as far as that. Of course, the guidelines will leave us in the dark, just as they are leaving practically everybody in the dark in many respects, but I doubt if you can draw that conclusion from the guidelines.

Mr. Poissant: That may be, but my conclusion is based on the application of the 95 per cent rule.

Senator Flynn: I know, but the intention of the bill is to control increases in prices and incomes after October 14, 1975, but not to roll them back. I do not think that you could do that. I do not think it is the intention of the bill. Whether the bill gives authority to the government or not is something else, because it is a blank cheque again. They probably could cast the net if they wanted to.

Mr. Poissant: You could be right. My conclusion is that 95 per cent is the maximum that can be obtained. Therefore, if this is in excess of that, I suppose the whole mechanism starts to come into play. Otherwise, firms with reduced volume could get more than 95 per cent under your definition.

Senator Flynn: I repeat, I think the rules there are in connection with increases in incomes and prices occuring after October 14, 1975.

Mr. Poissant: You are probably right. The regulations are not available, so it is only by deduction that we arrive at this conclusion, and I may be wrong.

I have read the regulations issued during wartime, when everything was done by regulation. There was one order in council establishing what they called "the Wartime Prices and Trade Board Regulations," and all the definitions were in them. At noontime I discussed with the Chairman a concern on the application of the bill, which could be cured by the regulations. This is due to the definition of "compensation" in the bill. As you know, there will be definitions in the regulations as well as in the bill. For instance, there is the definition of "compensation," in clause 2, which says:

> "compensation" means all forms of pay benefits and perquisites paid or provided, directly or indirectly, by or on behalf of an employer to or for the benefit of an employee;

It will be remembered that last week I discussed the excess compensation and how it was to be disposed of under the bill, as provided in clause 20. The excess could be applied against similar payments. I presume that if an excess salary were obtained the administrator may say that the next salary would be reduced by the excess of the previous one. In the case of dividends, I suppose it would be applied against the next payment of dividends. My concern is, in the case of excess compensation which does not fit into the two previous definition, it may, upon order of the administrator, be forced to pay an equal amount of the excess to the government as a kind of levy. What would happen if the excess compensation, say of $10,000, were subjected to

withholding tax at source, say by 50 per cent, which 50 per cent has already been remitted to the government? The payee receives only $5,000 of his $10,000. In that case, will he have to return $10,000 or $5,000 to the government or to his employer. I admit the $5,000 of income tax will be paid on behalf of the employee, but if the money has to be returned, especially the excess compensation, as a penalty to the government, should it be only the $5,000 the net cash received or the full $10,000?

Senator Cook: He had better withhold the withholding tax to be safe.

Mr. Poissant: Clause 20(5) says:

> Where a person has, as a result of an act or omission that he knew or ought reasonably to have known contravened the guidelines, received any compensation

Remember, the compensation is $10,000 in my example.

> or a dividend in an amount or value that exceeds that which he would have received if the person from whom he received the compensation or dividend had not contravened the guidelines, the Administrator may, if he is not satisfied that there are circumstances that, based on the particular facts of the situation, justify the contravention of the guidelines, make such order as he deems appropriate to accomplish either or both of the following objectives:
>
> (a) to prohibit the person from accepting any further such compensation . . .

That is not too bad, but let us go to paragraph (b):

> where no order has been made by him pursuant to subsection (4)

Which was the payor responsibility.

> arising out of the same circumstances, to require the person to pay to Her Majesty in right of Canada an amount stated in the order equal to the whole or any portion of the excess amount or value so received, as estimated by the Administrator.

Paragraph (b) is where I worry about the excess compensation to be refunded. Does he refund that $10,000 or only $5,000? Remember, the government has already received $5,000 on account of that $10,000.

Senator Connolly: On whose account has the government received it?

The Chairman: On account of the payee. The employer is only an agent to remit that money under penalty.

Senator Flynn: Is that the person who makes the payment or the person who receives it?

Mr. Poissant: In paragraph (b) it is the recipient.

Senator Flynn: It says "require the person."

Senator Cook: I am not clear. This does not apply to anybody who is not affected by the guidelines, does it? It has to be an employee of a company employing 500 people or more.

Mr. Poissant: Yes.

Senator Cook: In other words, for an employee of a small company the sky's the limit?

Mr. Poissant: That is right. There is, of course, the spirit of the thing.

Senator Cook: Voluntary, yes.

Senator Flynn: Subsection (4)(b) says:

> . . . to require the person to pay to Her Majesty in right of Canada or to withhold out of subsequent payments or credits of a like nature and pay to Her Majesty in right of Canada . . .

It can be the person who pays who has to withhold, and at the same time pay to Her Majesty an amount equal to the amount he or she has already paid to someone else.

The Chairman: Remember, the employer has different obligations under different statutes. Under the Income Tax Act he must withold and remit the withholding tax to the government. Having done that then, if he is paying more than the guidelines permit, he may have to pay the excess over, if the payer violates the law.

Senator Flynn: If I pay an employee more, I can be ordered to withhold from that person the excess paid and at the same time have to pay to Her Majesty an amount equal to the whole or any portion of the excess payment or credit.

Mr. Poissant: The payer is covered by sub-clause (4) of the bill whereas the payee is covered by sub-clause (5). So the employer is under sub-clause (4) and the employee, or whoever receives the dividend, is covered under sub-clause (5).

Senator Flynn: The way I read it you could have it both ways.

Senator McIlraith: Is not the purpose of the words "or any portion" in the order being made to permit dealing with the very point that is being raised? Is that not the purpose of it?

Mr. Poissant: That is a good point. That might be the answer. The phraseology is also used in the fixing of the prices in the net margin. It says that part or all of the excess may be paid back to the government. But that might be part of the answer there. Again, it may be provided in the regulations, but my question is can a regulation overrule a definition already provided in the bill. I am not a lawyer, but I would be inclined to think not. Surely the bill has precedence over the regulations. In that case the compensation is the amount paid. So if we are talking in terms of $10,000, subclause 20(5) the payee or employee might be forced to reimburse the whole amount of $10,000. His employer who acted as an agent for him has already been deprived of $5,000.

This is a point I raised with your chairman at noontime. There are other things I wanted to compare with "The Price and Trade Board Regulations," but I could not find much help there owing to the fact that it was quite concise, being just about one page.

It occurred to me that it might be necessary to raise prices because of special circumstances, and I thought that, if the regulations provided for advance rulings, it would be useful to have such a procedure in a case where you might have to raise your price over the normal additional costs or over your 95 per cent because of special circumstances. If you could simply write a letter to the board or to the administrator asking for an advance ruling, saying, for example, that "It is our intention to make a major capital expenditure in our plant, which will have the effect of reducing our price or increasing our volume, and we want the additional profit in order to cover our additional capi-

tal expenditures," that might be a case for an advance ruling, although it might be considered a marginal case: either acceptable or not acceptable. In any event, I think there should be some provision for such rulings.

Senator Cook: It is a good idea in theory, but in practice the board could never deal with the thousands upon thousands of requests it would receive.

Senator Connolly: The board will be getting those in the way of questions, anyway.

Senator Flynn: You must remember that the board, all told, is limited to 200 employees. There are five board members but the total projection of personnel is 200 persons.

The Chairman: Are you suggesting that if an employee receives a cheque for more money than he has hitherto been receiving he cannot simply say, "Hurrah!" and put it in his bank account, but has a duty under this bill to make inquiry to see whether he is being paid in excess of the guidelines?

Senator Flynn: I think the point being raised by Mr. Poissant is this: If you make an investment which will result in higher profits without an increase in price, will you be able to ask the board whether you can maintain your price, without being subject to reducing it, in order to be able to repay the investment over a period of time. Is that your question?

Mr. Poissant: That is the type of thing I think the industry would like to have. There are not that many industries covered by the bill. I believe the list of industries included 1,500 firms which would be subject to that law. How many of them will apply for a special ruling? Certainly, they would much rather know ahead of time that they would not be penalized at the end. Obviously, they would like to follow the law, and there might well be circumstances in which an advance ruling could help them do so.

Senator Flynn: I cannot see this bill providing a penalty for increased productivity. If, because of experiencing certain difficulties, you have increased your prices and then the year after having been granted the increase in price the difficulties disappear, I can see the board saying to you, "Well, your difficulties are over. You will now go back to the former price." But that again has to start from October 14, 1975. If I increase my productivity thereafter and get more profit, I am quite sure the bill will leave this profit to you. Otherwise it will be just plain stupidity.

Senator Buckwold: In explaining the bill the ministers have indicated that this would not preclude a gain from increased productivity to the companies involved. I have seen that in the reports.

Senator Flynn: They are providing that increased productivity will allow for an increase in salaries or in wages. So they cannot be contrary in the case of the profit of a company.

Senator Connolly: There is another aspect to the example given by Mr. Poissant. Increased productivity might well result in higher profits, if the volume is constant, but as a result of the capital investment there will be a higher cost. The cost of servicing the debt must enter into the picture, and it might well be an appreciable factor. It is simply a cost item which has been added. In a sense, then, one has offset the other a bit.

Senator Flynn: If you are using your retained earnings because you cannot pay higher dividends, the problem of the cost of borrowing will not occur.

Mr. Poissant: I believe Senator Connolly was also referring to the additional depreciation which perhaps will also be part of the additional cost. Am I right?

Senator Connolly: The cost of the money, yes.

Mr. Poissant: The additional cost due to depreciation should be able to be passed on to the customer.

Senator Connolly: If you had to borrow the money, for example, for the capital improvement, that would be a cost to you.

Senator Flynn: Depreciation is not a cost. It is part of the expense. You decrease your profit by your depreciation.

Senator Cook: You have to remember that there are two rights of appeal: there is the right of appeal to the tribunal; and the right of appeal to the cabinet.

Mr. Poissant: Or to the Federal Court of Appeal.

Senator Cook: But if we are talking about the board acting in an unreasonable or capricious manner, that hardly seems likely to me.

Mr. Poissant: But you have to pay the amount specified in the order to the Receiver General of Canada. This again may be considered a kind of penalty for advancing the money before the final settlement is due. But an advance ruling would have the effect, in some cases, of clearing up all these matters ahead of time,—that is, giving the board the leeway to say, "Yes, we will allow you to retain that additional income owing to the particular circumstances of your firm."

Senator Flynn: I think it is a good idea. There is no doubt that you could get rulings from the board in advance of whatever you contemplate doing. As far as that is concerned there is no doubt that it would be a good thing. What is in question here, however, is the fact that the board may be receiving thousands and thousands of such inquiries, and will not be able to cope with them.

Mr. Poissant: Yes, you are quite right.

Senator Flynn: We do not know what the guidelines will be. We do not know what the result of these things will be in the end. This discussion is very interesting, of course, even if only because we know that we do not know what is going to happen.

Mr. Poissant: What I was thinking of is this: I do not think you want to delay someone's action pending the ruling. If you want to raise your prices because of major capital expenditures, for example, I would have thought that you could certainly apply to the board or the administrator for a ruling, but at the same time you could raise your prices immediately. In other words, you put the mechanism immediately in motion so that you do not have to wait a year or two years after the results are out to be told by the board that you have an excess of revenue. Under the Income Tax Act you wait until you get your answer before putting the mechamism into motion, whereas in this case I thought perhaps you might seek a ruling just to say that you are about to do this—advising them of your intentions, in other words.

Senator Cook: I certainly think we should note this, and give it very, very careful thought. I have a little anxiety about it, but I still think it is a very good proposal. It may, however, be unworkable. That is the only thing.

Senator Flynn: You would not take the risk of increasing your prices just in the hope that you would get a favourable ruling, though.

Mr. Poissant: Mr. Chairman, there was another point that I wanted to bring to your attention. It refers to subclause 44(7) on page 32 of the bill. This paragraph seems to indicate that the officers of corporations will be responsible for any offence committed by the corporation.

Some two years ago one of the proposed amendments to the Income Tax Act was to the effect that officers and directors of companies were to be responsible for any omissions or offences committed by the company under the Income Tax Act. Before the amendment in question was passed, that particular provision was withdrawn, and did not go into the Income Tax Act, as such. It does not now exist. Is it fair that if a company commits some sort of offence under this law that the officers, including the directors, should be responsible for it?

Senator Flynn: I agree with you. At least the word "knowingly" should be included there, because you may not know at all. For a person to know all the regulations applicable during wartime to prices and everything else would have had to be a genius. It is impossible. The company may do something in good faith, and a director may have "authorized, assented to, acquiesced in or participated in the commission of the offence" without knowing it was an offence.

Senator Macnaughton: Is there not a qualification in subclause (8)?

Senator Flynn: No. That just says it is not retroactive.

> (8) Where a person has been convicted of an offence under subsection (3) or (4), he is not liable to pay a penalty imposed by an order made pursuant to section 21 on the basis of the same or substantially the same facts unless the order imposing the penalty was made before the information or complaint giving rise to the conviction was laid or made.

It seems to me that what it says is that if the effect of the order is retroactive, then there would be no penalty attaching to an officer or director of the company; but it does not change the text of subclause (7), which says that if you participated in the commission of the offence, even if you did it unknowingly, you would be liable to conviction and punishment.

The Chairman: You are talking about subclause (7), are you not?

Senator Flynn: Yes.

The Chairman: On page 32?

Senator Flynn: Yes. Senator Macnaughton was asking if subclause (8) qualified (7). I do not think it does.

The Chairman: But all these enumerations in subclause (7) imply knowledge of some kind.

Senator Flynn: Yes, but not that it was an offence. Supposing I participate in an increase in prices in the belief that I am allowed to do it. I would be liable under this provision.

The Chairman: Well, what does the language mean?

> . . . who directed, authorized, assented to, acquiesced in or participated in the commission of the offence . . .

Senator Flynn: Yes. If it is a decision of management, for instance, to accept the signing of a collective agreement providing for increases in salaries that exceed the guidelines, they would be liable even if they thought that their interpretation of the guidelines allowed them to do that.

The Chairman: That is right.

Senator Flynn: I mean, the *mens rea* is not there, and it should be.

Mr. Poissant: This particular proposed amendment in the Income Tax Act was withdrawn, at one time, probably after complaints were raised to its insertion in the act.

Senator Flynn: I have no objection, but that a person should be liable without proof of *mens rea*, it seems to me, is going a little too far, because here we are in the realm of so many regulations and so many complications and so many unknowns.

Mr. Poissant: One of the last items I would like to mention, Mr. Chairman, to your committee, deals with increases in prices for which a firm's clients had already been notified. Should they remain in force? Should they be accepted? Let us say the company announced in June 1975, that there would be a price increase in November of 1975, and has notified its customers accordingly. Should that price increase, that was announced prior to the act being passed be allowed, or does the company concerned have to go through the usual mechanism and justify the additional cost? This is a problem. Usually you publish a catalogue or price list, but it does not take effect immediately.

You would want to provide your clients with sufficient time to place orders under the new price list. The minister said that any labour contract that was in the process of being negotiated on October 14 should be exempted. That being so, why should price increases, especially those about which the clients were notified prior to October 15, not also be exempted?

Senator Flynn: I think the legislation would enable the board to deal with prices in the way you suggest. It is a good question. There is no doubt that collective agreements providing for an increase in excess of 10 per cent in 1976 signed before October 14, 1975 will be respected.

Senator Buckwold: I do not think you can compare an anticipated price increase as against a negotiated contract.

The Chairman: It is a commitment.

Senator Flynn: There could be a contract involved. It might be, for instance, that a company would agree to supply a certain product, but on the basis that the price would increase by $10 on November 1, 1976. That would constitute a contract.

Senator Buckwold: I read the comment as one where a company may be advised that on such-and-such a date some months in advance the price is going to go up. I cannot see us legislating that as being exempt from the legislation.

The Chairman: But that is a commitment.

Senator Buckwold: It is not a contract.

The Chairman: Is there any provision for varying that?

Senator Buckwold: The company may decide not to implement the price increase.

Senator Flynn: If the company decides not to implement the increase, there is no problem.

Senator Cook: Why should an unreasonable price increase be respected even though it was announced in advance of October 14? Why should any unreasonable price increase be exempted simply because it was announced in advance?

Senator Flynn: The answer to that lies in the manner in which collective agreements have been dealt with. The agreement involving Thetford Mines was signed on the Sunday night prior to the announcement being made simply because the persons involved knew something was coming. For that reason, the collective agreement provides for increases over and above the limits set out by the guidelines. Since the board has decided that such a contract cannot be interfered with, how could it interfere with a price increase that was announced in advance of the government's announcement?

Senator Cook: With all due respect, you have destroyed your argument. If what you say is correct, then every company, knowing that something is coming, could announce increases.

Senator Flynn: I agree. Those involved in the Thetford Mines contract knew that something was coming, and the board has now decided that it will not interfere with that contract.

Senator Cook: Two wrongs do not make a right.

Senator Flynn: Well, the board has decided that it is right in the case of collective agreements negotiated prior to October 14.

Mr. Poissant: If the price increase is to allow you to go from a loss position to a profitable position and you have advised all your clients of the proposed price increase by registered letter, or even by ordinary mail, not even knowing of this proposed law, then the ceiling should not apply.

Senator Cook: In that case, you could justify it.

Senator Flynn: Generally speaking, the board, I think, would respect such increases.

Senator Buckwold: Yes, if they can be justified. However, if it were an exorbitant price increase, there would be no reason why it should be exempt.

Mr. Poissant: I have one further comment to make, and that is in connection with 12.1(b), which reads:

> (b) identify actual and proposed changes in prices, profits, compensation and dividends that, in its opinion, contravene or, if implemented, would contravene the guidelines either in fact or in spirit;

I question the words "or in spirit". What does that phrase mean?

The Chairman: Perhaps you should put an "s" on it.

Senator Flynn: If the board has reason to believe that an intended or actual increase may contravene the guidelines, then it may act. In other words, it does not have to have definite proof. I think that is the meaning of the phrase. Perhaps clearer language could have been used.

Senator Lang: There is the spirit of the law and the law itself. I must say, I have never seen "spirit" used in a bill.

The Chairman: It may mean the overall intent.

Senator Lang: Yes.

Mr. Poissant: Finally, it is hoped that the regulations will cover the definition of "a group." Something else that will have to be clarified is the phrase "fiscal year for compensation." Will the fiscal year for the individual be the calendar year, or will it be the company's fiscal year? That seems to be an unanswered question at this stage.

The Chairman: For income tax purposes, the calendar year is the accounting year for the individual.

Mr. Poissant: The question is whether the $2,400 maximum increase will be the individual's calendar year increase or the maximum increase in the company's fiscal year. I imagine the regulations will clarify that.

Honourable senators, that concludes my remarks at this stage. To repeat, most of my remarks are based on the limited amount of documentation available at this stage and some of my conclusions are forcibly arrived at by deduction.

Senator Lang: And in spirit.

Mr. Poissant: Yes, in spirit.

Senator Lang: Before you conclude, Mr. Poissant, may I revert to the export question? If a company is only involved in the exporting of goods from Canada, is there any ceiling on what that company can charge for its product?

Mr. Poissant: According to the guidelines, you have to meet the international price. If by so doing, your aggregate profit is in excess of 95 per cent of your profit before taxes for the previous five years' average, a special levy would be applied. That is my understanding. Please do not take that as being the gospel. That is my understanding from reading the guidelines.

Senator Lang: I presume this is to prevent a company from switching all of its business from domestic to export in order to realize a higher profit.

Mr. Poissant: Yes. On the other hand, my answer seems to be unfair to the country as a whole. If we were to get higher prices on the export market, which would be of benefit to the economy of the country as a whole, then why should we not be able to do so without penalty?

There is no question raised in the guidelines as to a case of exclusively exporting. The guidelines deal with a combined operation of export and domestic sales. They say, "Export at the international price, but sell domestically at unit costs," and both together combined not to exceed the 95 per cent rule, but no question is raised in the case you mentioned. I am therefore a little lost to answer. If I apply a formula for the combined one, I would arrive at that answer.

Senator McIlraith: It is also complicated by the fact that when they deal with this particular point they will be confronted with the shortage of foreign exchange and the balance of payments problem, which should rather indicate that there should be no limitation on the earning of foreign exchange.

Senator Flynn: There would be pressure from the employees of that company for higher wages, saying that the guidelines are unfair because the company makes more money; their ceiling is established whereas the company's profit is not. There are all sorts of elements that enter the picture.

The Chairman: I have been trying to see what the philosophy is behind this. Somebody sells in the international market, which is of great value to Canada in obtaining badly needed foreign exchange; once that is realized, this method of treatment proposes to take away some of the advantages that have been derived. I just cannot add it up and get an answer.

Senator Lang: It is a sort of first DISC program. It does not make any sense.

The Chairman: Why should not such a company be able, without penalty, to pool their profits?

Senator Flynn: As long as you are being competitive. The purpose of controlling prices and incomes is to remain competitive on the world market, not only in one product but overall. This is the problem of inflation. If wages are continually increasing we work ourselves out of the world market.

The Chairman: That is right.

Senator Flynn: That is another aspect. How all these factors can be balanced into guidelines and regulations is another matter.

Senator Lang: From a practical point of view it is almost impossible to sell on world markets at world market prices, so it is really academic.

Senator Flynn: There may be a shortage at one time and we take advantage of it; at the same time you provoke other people to go into the same area.

Senator Cook: In any case, you cannot compare newsprint to newsprint or copper to copper. There are so many differences between manufacturers that there is nothing to compare it with.

Senator Flynn: If everybody is interested in exporting it would create an unfair situation for producers for the domestic market, who would say, "These people can make more profits than we can. It is unfair." Like the workers, they would say, "Why me?"

The Chairman: I should call your attention to the fact that I think we distributed to you questions and answers on the initial guidelines. There is one question:

> What is the special levy which will apply to exporters?

This is something we have been talking about for a while. The answer given is:

> The exact nature of this special levy will be announced following consultations with interested parties.

How do we hope to advise? We can surmise. We can apply some reason or business sense, but it will turn on consultations with interested parties. I would say that the guiding principle in any international trade is to do as much international trade as possible, but not to let the domestic market suffer. However, we need the foreign exchange.

Senator Lang: Foreign exchange will be the overriding consideration, looking at the picture this year.

The Chairman: That is right.

Senator Cook: In any case, it is enough for us to pass legislation to protect the Canadian consumer and let the other consumers look after themselves.

Senator Lang: It is a question of: to hell with them!

Senator Cook: Exactly. I'm all right Jack!

Senator Flynn: To be fair to everyone we would have to control everyone. Without comprehensive excess profits tax and regulations prohibiting strikes this legislation will always lead to inequitable situations.

Senator Buckwold: There is no doubt that we are locking in a lot of inequities. I suppose any program of that type would.

Senator Flynn: By leaving only two or three loopholes like that the program is endangered very rapidly.

The Chairman: Of course, they may detect them and move quickly.

Senator Flynn: I can see them detecting them quickly, but moving quickly is something else.

The Chairman: You have a special definition.

Senator Lang: I think our report will be largely an act of faith.

Senator Flynn: I suppose it is possible that the bill will come to the Senate tomorrow. I do not imagine the committee will make any report before the bill comes to the Senate.

The Chairman: I was wondering whether we should make any report.

Senator Cook: No.

Senator Flynn: My opinion is that we should not at this time, and that we should stop sitting on it until the bill passes second reading in the Senate, then we can come back and deal with it in committee in the ordinary way.

Senator Cook: After all, we will know a lot more about it when we get the explanation in the Senate.

Senator Flynn: Is Senator Cook going to explain it?

Senator Cook: Not this time.

Senator Flynn: Is the chairman sponsoring the bill?

The Chairman: I was not proposing to have any further committee meetings on the subject matter of it, because the bill will be in the Senate and will in due course come to us.

The committee adjourned.

FIRST SESSION—THIRTIETH PARLIAMENT
1974-75

THE SENATE OF CANADA

PROCEEDINGS OF THE
STANDING SENATE COMMITTEE ON

BANKING, TRADE AND COMMERCE

The Honourable SALTER A. HAYDEN, *Chairman*

Issue No. 68

WEDNESDAY, DECEMBER 3, 1975

Eleventh Proceedings on:

"The *Subject-Matter* of Bill C-60, Bankruptcy Act, 1975"

(Witnesses: See Minutes of Proceedings)

29821—1

THE STANDING SENATE COMMITTEE ON BANKING, TRADE AND COMMERCE

The Honourable Salter A. Hayden, *Chairman*

The Honourable Senators:

Barrow	Hayden
Beaubien	Hays
Buckwold	Laird
Connolly (*Ottawa West*)	Lang
Cook	Macdonald (*Cape Breton*)
Desruisseaux	Macnaughton
Everett	McIlraith
*Flynn	Molson
Gélinas	*Perrault
Haig	Sullivan
	Walker—(19)

**Ex officio* members

(Quorum 5)

Order of Reference

Extract from the Minutes of the Proceedings of the Senate, May 13, 1975.

"The Honourable Senator Hayden moved, seconded by the Honourable Senator Bourget, P.C.:

That the Standing Senate Committee on Banking, Trade and Commerce be authorized to examine and report upon the subject-matter of the Bill C-60, intituled: "An Act respecting bankruptcy and insolvency", in advance of the said Bill coming before the Senate, or any matter relating thereto; and

That the Committee have power to engage the services of such counsel, staff and technical advisers as may be necessary for the purpose of the said examination.

After debate, and—

The question being put on the motion, it was—

Resolved in the affirmative."

Robert Fortier,

Clerk of the Senate.

Minutes of Proceedings

Wednesday, December 3, 1975.
(88)

Pursuant to adjournment and notice the Standing Senate Committee on Banking, Trade & Commerce met this day at 9:30 a.m.

Subject: "The *Subject-matter* of Bill C-60—Bankruptcy Act, 1975.

Present: The Honourable Senators Hayden, (*Chairman*), Barrow, Beaubien, Buckwold, Connolly, (*Ottawa West*), Cook, Everett, Flynn, Hays, Laird, Macnaughton, McIlraith, Molson and Walker. (14)

Present, not of the Committee: The Honourable Senator Smith, (*Colchester*). (1)

In Attendance: Messrs. David E. Baird and Melvin C. Zwaig, Advisors to the Committee.

WITNESSES:

Canadian Bar Association; Special Committee on Bankruptcy:

Mr. Bernard Mayer, Q.C., Joint-Chairman, Toronto;

Mr. Michael Greenblatt, Q.C., Joint-Chairman, Montreal;

Mr. Ronald Robertson, Q.C., Member of the Committee, Toronto;

Mr. T. H. Montgomery, Q.C., Member of the Committee, Montreal; and

Mr. Ronald C. Merriam, Q.C., Executive Director.

The Committee then proceeded to the examination of the above subject and questioning of the witnesses.

At 12:15 p.m., the Committee adjourned until 2:30 p.m. to further consider Bill C-2.

ATTEST:

Frank A. Jackson,
Clerk of the Committee.

The Standing Senate Committee on Banking, Trade and Commerce

Evidence

Ottawa, Wednesday, December 3, 1975

The Standing Senate Committee on Banking, Trade and Commerce met this day at 9.30 a.m. to consider the subject matter of Bill C-60, respecting bankruptcy and insolvency.

Senator Salter A. Hayden (*Chairman*) in the Chair.

The Chairman: Honourable senators, we have quite an array of appearances this morning, which may keep us most of the day. First this morning, in connection with the bankruptcy bill, we have the Canadian Bar Association, the appearances for which are: Mr. Bernard Mayer, Q.C., of Toronto, Joint-Chairman, Canadian Bar Association Special Committee on Bankruptcy; Mr. Michael Greenblatt, Q.C., of Montreal, Joint-Chairman; Mr. T. H. Montgomery, Q.C., a member of the committee, from Montreal; Mr. Ronald N. Robertson, Q.C., a member of the Committee from Toronto; and Mr. Ronald C. Merriam, Q.C., Executive Director, Canadian Bar Association.

Honourable senators, the members of the Canadian Bar Association delegation, in the order of their appearance, are Mr. Mayer, immediately on my right, then Mr. Greenblatt, Mr. Montgomery and Mr. Robertson. I understand that the panel has settled on a manner of presentation. Mr. Mayer will make a short opening statement, following which they have settled on certain subject matters to which certain members of the panel will speak. Mr. Mayer, you have the floor.

Mr. Bernard Mayer, Q.C., Joint-Chairman, Special Committee on Bankruptcy, Canadian Bar Association: Thank you, Mr. Chairman. The Canadian Bar Association set up a special national committee, which is relatively small, of bankruptcy experts as long ago as 1970, when the original White Paper was put out, and we have been studying this legislation, pending legislation and the policy behind it since then in some depth. Most of the members of the panel are bankruptcy specialists.

We would like to make two or three rather fundamental comments with respect to the bill. The first is that, as members of the committee know, there was controversy among the members of the profession as to whether we needed a bill at all, or as to whether matters could be handled by a series of amendments and, in effect, a consolidation of the various acts. There is no point, in our view, in pursuing that controversy. We believe we should accept the fact that a bill has been brought forward which contains a great many worthwhile new ideas. It is also, in our opinion, without question the most complex and technical piece of legislation that has been brought forward by the government in what we might call the legal area since the income tax bill. Our committee is primarily interested in policy, rather than technical drafting problems. However, we can assure you that this bill as it is now drafted—and without disrespect to those who drafted it because, in my opinion, anyone drafting something completely new, with new concepts, was bound to find themselves in that position—is booby-trapped with technical and drafting pitfalls, and I think the committee is unanimous in saying that we think that if this legislation is to go forward, as we hope it will, it should do so at a somewhat leisurely pace, because the worst thing that could happen is to enact a piece of legislation which then does not work. Bankruptcy is a technical subject, but it cuts across the entire spectrum of business relationships. If something goes wrong there, you affect corporate financing and other matters.

There is only one other thing that I want to say by way of introduction. The Canadian Bar Association decided that it would not make any comment on some of the fundamental social issues which underly the bill. The entire consumer arrangement program obviously focuses for the first time on what is really a very major social problem brought on by the credit revolution.

Whether the fundamental approach taken by this bill, that people should be induced as much as possible to go into consumer arrangements and extensions rather than go bankrupt, is a sound approach, is something which, if you look at what the sociologists who are working in this field have said, is a very debatable subject.

We, as a bar association, have no views on that subject. We have concentrated on looking at the consumer arrangement provisions from basically a technical point of view to see whether they work. We do not think it is appropriate for the Bar Association as such to express a view on social issues.

Mr. Michael Greenblatt, Q.C., Joint-Chairman, Special Committee on Bankruptcy, Canadian Bar Association: Mr. Chairman, may I add a word to that?

The Chairman: Yes.

Mr. Greenblatt: In support of the policy statement made by Mr. Mayer, I would like to make the point that it was duly recorded at the last Canadian Bar convention, held in Quebec City. It was based on a report which the co-chairman submitted to the National Council of the Bar Association at that time. The record will show that we indicated, and it was so proved, that the approach of the Canadian Bar Association should be not to attack directly the major social policy behind the bill, nor become a special lobbying group for segments of Canadian society. Instead, the association, through its committee, should concentrate more on the technical aspects of the bill, strive to eliminate its impractical solutions, its many ambiguities, lack of clarity, and underscore gross and grave inaccurate inequalities where and if they continue to appear in any areas.

Senator Laird: Mr. Chairman, could I get mv perennial beef off my chest?

The Chairman: I was just waiting for it.

29821—2

Senator Laird: Gentlemen, you have made a general opening statement. This morning, when I read your brief, it was very refreshing to see this sentence on page 2:

> The committee is not convinced that it was necessary to produce a major new bill of the type contained in Bill C-60.

Then you go on, unfortunately, and say you are prepared to accept the fact that there will be a new bill. You did say it was controversial, and maybe this was impossible to do, but your brief disappoints me in this respect. Why could you not simply have said, "Here are the reforms that are needed. Here are the amendments to the existing act which will affect those reforms"?

Mr. Mayer: Mr. Chairman, in reply, I think, first, the Bar Association is divided on this issue. Secondly, there is the point that they want to consolidate all these statutes under one statute. The department says that it complicates the process of amendment.

We basically felt that the government had brought forward a new bill—and certainly you could make a reasonable case for bringing forward a new bill—and that was a windmill at which we did not particularly want to tilt, bearing in mind that our membership was divided on the whole issue. Therefore we felt that the most realistic attitude to take, and a very understandable attitude, was to take the bill and comment on it.

Senator Laird: You say your membership was divided. Obviously you must be confining that to the experts or the persons with knowledge of bankruptcy matters.

Mr. Mayer: Yes.

Senator Laird: You simply could not agree, then, that this new legialation was entirely unnecessary?

Mr. Mayer: No. There was a majority in favour of accepting the bill. This particular passage of the brief represents the majority viewpoint. There was a division.

Senator Laird: Do you remember what happened with the Income Tax Act?

Mr. Mayer: Yes, senator.

Senator Laird: Was that not a precedent to give you a clue?

Mr. Mayer: Well, senator, I think that any piece of legislation, if it is adequately studied, can be made to do the job, and certainly this new bill contains many worthwhile features.

Senator Laird: But those new and desirable features, some of you felt, could have been incorporated by an amendment to the present act.

Mr. Mayer: Yes. Some members of the committee felt that, but the majority felt that we should take the position we have taken.

Senator Laird: Mr. Chairman, I do not see Senator Connolly here, but he raised this point.

The Chairman: He will be here.

Senator Laird: Anyway, I will raise it for him. Do you realize that under an entirely new act, all of the existing jurisprudence, or most of it, will lose any utility in connection with arriving at an opinion on bankruptcy matters?

Mr. Mayer: Senator, that particular subject is, I think, very much overstressed in its importance. This is basically a bill and most of the jurisprudence deals with relatively minor drafting points. There are some major points where jurisprudence is very important—particularly, for example, in the preference area, which I gather is not primarily on the agenda. I think that point can be dealt with when discussing particular areas of the new bill.

Senator Laird: I am no expert in bankruptcy, but as a lawyer it seems to me that it is important when giving an opinion to a client. How can you do that unless you have a line of decided cases?

Mr. Mayer: That depends on what is the subject. If the bill is properly drafted in certain areas, it should create its own certainty.

Mr. Greenblatt: Mr. Chairman, I do not think the majority of the members of the Bar committee are ruling out the proposition that if the preparation of an acceptable new act of bankruptcy will take too long, will take several years, in the interim amendments should be made to the present act, especially amendments of those special features which can easily be included in the present act, such as reference to the priority of the Crown, to landlords and tenants, and various other aspects of the bill so that these come into effect as soon as possible.

Senator Laird: For example, to pick one out of the air, the matter of wages. I see with interest you propose an insurance scheme. I can tell you, that has been kicked around in this committee, so you may not labour too much on that.

Mr. Greenblatt: At least half a dozen or more changes, or amendments, can be introduced by way of amendment while waiting for a properly prepared and acceptable bill.

Senator Laird: I do not know why we should have a new bill at all. That is my point.

The Chairman: Senator Laird, in my view you have to look at it from three points of view. One, the present act; two, the present bill; and three, the bill that might result from the work we do. You might say that the work we do may restore many features of the present act, and therefore have the new act related more to the present act. But if you relate the bill to the present act, you will find some substantial changes, a lot of which we may not decide to accept.

Senator Laird: For example, doing away with the registrar.

The Chairman: That is right. The first item that the panelists are going to develop is the question of administration. I think Mr. Montgomery will develop that.

Senator Walker: Mr. Chairman, before he does so, may I ask Mr. Mayer a question? Were you consulted by this particular group that drafted this act?

Mr. Mayer: The answer is that in 1970, when the government put out its study paper, there were extensive representations made by the Bar Association, the Canadian Institute of Chartered Accountants and others. There were a couple of quite large meetings held in Ottawa to discuss the entire project.

Senator Walker: Did you have anything to do with the appointment of the committee?

Mr. Mayer: Nothing whatsoever.

The Chairman: Go ahead, Mr. Montgomery.

Mr. T. H. Montgomery, Q.C., Member Special Committee on Bankruptcy, Canadian Bar Association: Mr. Chairman, honourable senators, the Canadian Bar Association has no general statement to make about the administration or about the courts, which is the other item I am supposed to cover. Your committee has studied the subject so deeply that no good purpose would be served by such a statement.

The new office of bankruptcy administrator is one which the Bar is prepared to accept, but which it feels needs a great deal more work. Mr. Mayer has said that we are not going to go into the social aspects of consumer bankruptcy and consumer arrangements, the area in which the administrator has the greatest function. However, there are two other areas we wish to comment on, one being the area in which the administrator takes over part of what used to be the registrar's functions and the other being where the administrator assumes powers and functions which would ordinarily fall to the trustee in bankruptcy. We are critical of the extent to which the administrator invades both of those areas.

I gather from the statements that have been made to this committee that the draftsmen of the bill feel that the registrar had an unfortunate mixture of judicial and administrative functions, so they gave the judicial functions to a judge and all of the functions that they considered administrative to the new administrator. It seems to me that this makes for an equally unfortunate mixture of functions to be carried out by the administrator. It is difficult to draw the line between an administrative function and a judicial function. A great many decisions could be termed judicial as well as administrative. The new administrator will have a great hodge-podge of junctions.

Under the heading of the "Courts," the Bar is very strongly of the view that the position of registrar should not be abolished. I will talk about that further, if it is the wish of the committee, when we get to the subject of the courts. Given that we want the position of registrar to remain, we recommend very strongly that we get the best of both worlds. It is the recommendation of the Bar that the administrator's duties be cut down to what is absolutely clearly administrative and that all of the borderline matters be returned to the jurisdiction of the registrar.

Senator Connolly: Would you elaborate as to why you feel so strongly about the retention of the position of registrar?

Mr. Montgomery: I was going to get to that under the heading of "Courts," senator, but I can just as well elaborate on it at this point. Our main reason is that the registrar has always functioned so well. I practice in the province of Quebec where there is no registrar in our normal civil court system, and the existence of the position of registrar in the bankruptcy court has always been a revelation to me of what a great benefit a registrar is. I would very much like to see a registrar in our civil court administration in the province of Quebec just as there has been and is now a registrar in the bankruptcy court. I think lawyers involved in the practice of bankruptcy law in all provinces will agree that the position of registrar in respect of bankruptcy matters is one which serves a very worthwhile function.

Senator Connolly: Would you care to say something about the judicial function of the office of registrar and whether it is important, in the view of the Bar, to have that intermediary between the administrative side and the court side, so to speak, although the registrar is part of the court.

Mr. Montgomery: I think, in practice, it is essential, both from the point of view of the functioning of the court and for the ordinary exercise of everyone's rights, to have that intermediary.

I think that all lawyers feel that there should be a right of appeal available as a general rule rather than as the exception. I am now getting into the area of the courts. One of the things that the Bar is bothered by in the new bill is that decisions of the administrator can only be appealed under certain specific circumstances. There is no across-the-board right of appeal from any decision of the administrator. We feel there should be an across-the-board right of appeal. Otherwise, great hardship might accrue. We are at the mercy of a functionary, an administrator.

I know the draftsmen of the bill are of the opinion that because of the great mass of matters coming before the courts that this mass must be reduced by providing a right of appeal only under exceptional circumstances. This seems to be a rather retrogressive step as far as the Bar is concerned. We have now a wide open right of appeal under the Bankruptcy Act from just about any order that we may be subjected to, and I do not think this has resulted in any undue mass at all. I think it is the experience of the practitioners that it has not done any harm; rather, it has resulted in a lot of good. As we all know, anyone making a decision against which there is a right of appeal is a better judge as a rule because of that right of appeal. I think they have the thing the wrong way around. We all know that under the old Winding-Up Act, for instance, the liquidator had to go to the court to get permission to turn around. In every case record there would be a thousand judgments, which was silly, but that was because he was required to go to the court for all sorts of things. Under this bill, we are being forbidden or prevented from going to the court, which is quite a different thing.

We should not be made to go to court for permission; we should be given the right to do things on our own. But, on the other hand, we should not be deprived of the right of appeal.

It would seem to be an essential link, as you say, senator, between the administrative function and the judicial function to have the registrar and, of course, he is readily available on short notice and can take the load of the judiciary. The registrar is an essential buffer between the two levels.

Mr. Ronald N. Robertson, Q.C., Member, Special Committee on Bankruptcy, Canadian Bar Association: Mr. Chairman, we organized ourselves on the basis that there would be a lead speaker and a back-up person amongst the four of us. With respect to Senator Connolly's question dealing with the registrar, we have tried to summarize our points at the bottom of page 21 and the top of page 22 of our brief. I will not read that, but the particular point which I think has not been sufficiently appreciated in the drafting of the bill is that bankruptcy has certain unique features. When you are talking of a commercial bankruptcy you are talking of a dynamic situation, of a going business, which is in financial difficulty. You are not speaking of a static situation. You therefore need some

person of a judicial mind and occupying a judicial position to whom you can go on what may be very important *ex parte* or unopposed matters, starting with the appointment of the interim receiver. The interim receiver then might need money, so he has to rush to somebody who is prepared to make a decision and who has the appropriate qualifications, experience and expertise to authorize the interim receiver to borrow such and such an amount of money on such and such terms. There are many problems for an interim receiver or a trustee, particularly in the case of a dynamic situation, as I say, where he is dealing with a running business. He has got to have somebody, it should be a court officer, to whom he can go very quickly and say, "Here is my problem. Here is my proposed solution. May I have authority to do it?"

We have a very great difficulty in seeing how the administrator can perform this kind of function. We equally have difficulty in seeing why it should be visited upon a superior court judge. We are also apprehensive that superior court judges sufficiently overloaded, as they are, may be less readily available than a registrar, who knows this is one of his prime duties, to see you when you are coming up and saying, "I have an urgent situation, can I have authority?"

Senator Connolly: Would you like to comment about the body of jurisprudence that has been built up, as a result of decisions of registrars, taking into account the problem of uniformity? This is a national act, involving registrars in all of the provinces, and I take it there should be some uniformity in decisions and, consequently, administration in bankruptcy matters flow from the fact that you do have that kind of body of jurisprudence built up by people who are experts in the law.

Mr. Robertson: I would respectfully agree. In particular, it is most useful that registrars' decisions on particularly difficult points, which merit it, are reported in the law reports, just like any other judicial decision is. I would not think that the decisions of the administrator would. Our real concern is on this particular type of thing, you would have to go to a judge in many of these instances. The judge has not the time to hear you that quickly.

I must emphasize, this is one of our major apprehensions, the fact that you are dealing with a dynamic situation of a business that may be sinking and a day or so may make the difference between the ability of the trustee or interim receiver to at least keep it temporarily afloat for an advantageous disposition, or even survival, rather than its complete submersion.

The Chairman: Are there any other questions?

Mr. Robertson, I think you are scheduled to speak on the consumer debtors and the discharge of the bankrupt. Mr. Montgomery, you have dealt with the courts.

Mr. Montgomery: On the court situation, just to complete the administration part of it, as you will see in our brief we are strongly of the opinion that some of the functions that are given exclusively to the administrator should be shared with the trustee in bankruptcy, such as the power to initiate an investigation of a dishonest bankrupt.

The bill deals with the functions given to the administrator. In the brief, just as an example of various things, we take it that the trustee should have equal powers in these various connections, if not exclusive power.

Mr. David E. Baird, Adviser to the Committee: Excuse me, Mr. Montgomery. What is your position with respect to the right of the administrator to act as chairman of the meeting of creditors to consider a proposal?

Mr. Montgomery: Frankly, I have not given that very much thought. This has always been an individual thing. It does not matter what you call them, some people will do a horrifyingly bad job as chairman of the meeting, regardless of what their title is, and other people will do a good job. I do not think there is anything you can do about that, except in choosing individuals.

Senator Flynn: This would apply not only to administrators but also to judges.

Mr. Montgomery: Just to complete the question of the court, there is a question of naming judges to sit in bankruptcy. The Bar is in favour of restoring the provision of section 155, or whatever it is, in the present act which permits the chief justice of the province to specifically name people to sit as bankruptcy judges. That is really all there is to say about that, except there has been some recent discussion about decentralizing bankruptcy jurisdictions, and the present bill being aimed at effecting that. I do not see how anything that is in the bill is going to effect any particular decentralization.

The Chairman: Why should decentralization be regarded as having such great virtue?

Mr. Montgomery: It seems to me, Mr. Chairman, that given that bankruptcy courts are superimposed on the existing court structure of the various provinces, if you have a problem as in Ontario, which does have a centralized court system, you are going to have to put up with that centralized system for bankruptcy purposes until Ontario changes it.

Senator Connolly: The very fact that you now have registrars and judges nominated to deal with bankruptcies in the provinces results in a certain decentralization.

I do not know that there is any special virtue in decentralization. If there is, it is in the present law, is it not?

Mr. Montgomery: As the present law is, the extent of decentralization is left to the structure of the existing federal courts, as administered in the various provinces.

In Ontario the system is centralized. In Quebec it is to quite an extent decentralized. If I want to put someone in bankruptcy in Sherbrooke, only 100 miles from Montreal, I can do it in Sherbrooke. There is a registrar there and there is a judge there and so on. That is the way it shakes out.

I think there is a variation right across Canada. It seems to me it is not a thing that can be dealt with by this new law, and that it should properly be left to the autonomy of the court system of the provinces, and to their chief justices; otherwise we are going to have two tides running across each other in the court system.

The Chairman: At any rate, the system has worked well.

Mr. Montgomery: It has indeed.

The Chairman: Are there any other questions?

Mr. Robertson: If I may, Mr. Chairman, as Mr. Montgomery's backup man, refer you to page 15 at the very bottom of our brief.

The Chairman: Yes.

Mr. Robertson: The brief tries to summarize what Mr. Montgomery, in a sense, is saying. We are very respectfully suggesting that this whole concept of the administrator needs substantial analysis because of the strange amalgam he is going to become, as summarized there. I will not read it, it is before you, but I would like to emphasize that aspect of it.

The other thing that concerns us, which in our respectful submission we think is an error, is that some functions under the proposed bill are suggested be moved to the administrator, which are judicial and which are clearly not administrative. An example of that is the taxation of solicitors' costs. Solicitors are officers of their courts. They are subject to the discipline of their courts and certainly in Ontario there is a general provision for the taxation of a solicitor's account in any circumstances by the court.

We have, in this bill, a strange form of discipline by the administrator. For example, if a solicitor signs a false statement that he had no conflict of interest, who should be in very serious trouble, the penalty proposed is that he may have his fees disallowed. We respectfully submit that taxation of accounts is clearly not an administrative question; that is a judicial question. We suspect that the reason why it has been moved to the administrator is because of the deletion of the registrar and they did not have anywhere better to put it. If the registrar is put back in, then clearly that should be a function that he would perform.

Mr. Montgomery: Very briefly, Mr. Chairman, this is a very important function. It is important from the point of view of the public. It is not just a question of convenience of lawyers in having their accounts taxed.

In Quebec we have no registrar. We have no basic system of lawyers' fees being taxed by the court. It ends up with the client, if he does not like how much the lawyer is charging him, coming before the Bar and having it arbitrated. I am involved with that. I know there are thousands of cases a year. This is a big thing for the public. Fortunately, in the bankruptcy system we now have a judicial officer who decides with respect to these matters so that the members of the public can feel that they have had a proper judicial hearing as to how much the lawyer is taking out of the bankruptcy, rather than it simply being rubber-stamped by an administrative official behind a counter.

The Chairman: The third item is with respect to consumer debtors and discharge of the bankrupt, to which I believe you are to speak, Mr. Robertson.

Mr. Robertson: Yes, Mr. Chairman. If I might take the liberty, an earlier question was asked with respect to which I think our position might be clarified just to a degree, as to the question of amendment as against a new bill. That was for our committee a very difficult question with which to cope, because it involves both legal questions upon which we think we should attempt to render such assistance as we can, but also it involves policy considerations. The government seems to have made the policy decision that they will do that which is embodied in this legislation. It should not be interpreted that if an approach was taken by way of amendment and possibly a new bill, or a new part to the present act, dealing completely with the consumer-debtor problem—I think I am correct in saying this for all of us—our committee would vote against that position. We know there is a strong view that the amendment approach has much to commend it in the way of preservation of jurisprudence and the avoidance of new language, new terminology and lengthy periods of uncertainty. So the reason the majority decided that we would go along this way was that this was, it seemed to us, a policy-type question. There are many arguments in favour of going this way, but it should not be interpreted that if the reverse were the situation we would be saying, "Oh, no; that does not work. Bring in a new bill". That would be a misconstruction, I believe I am fair in saying, of our position. Does that help, senator?

Senator Laird: That does help.

The Chairman: Are there any questions?

Senator Walker: Just to summarize, have I correctly understood your argument, that you would prefer that the old bill be amended in accordance with your suggestions and that at this time it is such a voluminous and weighty task to draft an entirely new bill that the present bill should be set aside and the old bill amended?

Mr. Robertson: No, I cannot say that, sir. I do say that we were faced with this new bill and appointed as a committee to study it and to make such recommendations as are appropriate with respect to the new bill. The question of whether the approach should be a new bill, compared with amendment of the present act, although I would admit in a sense it imports some legal questions with respect to loss of jurisprudence and so on, but it also imports a policy question with which we did not feel free to deal.

There is one further practical question, Senator Walker. The bill itself is sufficiently complex to work on. To also attempt to come up with a reasoned statement that the things that really need to be done can be done by way of amendment of the existing Act, then to face the question, "All right, what amendments do you suggest?" Could be a Herculean task. It is bad enough to go through this one, so we decided that we should study the bill as presented to us and give whatever assistance we can to you on it and not recommend against the approach being taken. However, we would not wish to be misconstrued as saying we would be hostile, or go against the other approach so far as the Canadian Bar Association committee is concerned.

Senator Everett: I have a question in that respect. I do not understand this concern as to whether it is a new bill or an amended bill. It would seem to me, and you can correct me on this statement, that the jurisprudence is largely transferable from bill to bill. The jurisprudence exists in respect of certain sections that will reappear in the new bill and will, in fact, not be lost as it now exists. Is that not so?

Mr. Mayer: The answer to that, senator is, as Senator Hayden has said, that that depends on the contents of the new bill. Obviously, up to a point this is a question of mechanics, whether it is done one way or the other way.

Senator Everett: Clearly that is the case, but if the bill were amended we would still be in the same position, with new sections subject to new interpretations.

Mr. Mayer: The argument as to a new bill or an amended bill goes further than that. Logically, senator, your reasoning is unassailable. I believe that those who feel that this reform project should have been achieved by an amended bill clearly go further than that. They say that there are

many concepts in the existing legislation which should have been preserved and there is no point in starting afresh. Those who think along the lines of an amended bill, in my opinion, are really saying that there should be only changes made in those areas which clearly very urgently need change and the remainder should be left alone.

Senator Everett: Yes, but that is an argument that would apply to an amended bill or a new bill. It seems to me that one of the arguments put forward is that the new Income Tax Act created a difficult situation for us, yet it was an amendment and the 1952 act still exists. It was a late amendment.

Mr. Mayer: This whole thing is a matter of technique and how many changes are required. This is why, I think, the Bar Association, as the rest of us have said, really could not become excited with respect to this point of technicality as to which way it is done; it is a question of what is in the bill that matters.

Senator Cook: It seems to me, Mr. Chairman, that we tend to consume a lot of time dealing with this, when we have it before us as a matter of government policy. I would think that each section should be examined and if there is some defect apparent, such as losing jurisprudence, we would consider that section. However, to attempt to debate amongst ourselves whether there should be an amended bill and this legislation abandoned seems at this stage to be a waste of time.

The Chairman: We have Bill C-60 before us and the question is, is there any good reason why we should say we will not pass it because a better bill is being scrapped or repealed? That is what we are studying.

Senator Cook: Will that not become apparent as we examine the sections?

The Chairman: That is correct. Some of them are good and, to the extent that we recognize that, I would think that our report will recommend or provide for the inclusion of those sections. Otherwise, Senator Everett, on the question of jurisprudence, even if the existing jurisprudence is affected by the bill to the point of changes in the law as a matter of interpretation, at least we will have a starting point as to what the law was, and while jurisprudence in those circumstances might not exist, another volume of jurisprudence will quickly build up.

Senator Everett: I am in agreement with the point raised by Senator Cook that it really does not make a devil of a lot of difference. My point was that the Income Tax Act was handled by way of amendment and it still exists and we are dealing with the 1952 act, as amended. That is the point, that we will experience confusion even with an amended bill, or a new bill.

The Chairman: Do not let us return to discuss that. It is your turn now, Mr. Robertson.

Mr. Robertson: With respect to consumer debtors, our comments commence at page 4, and I will not read them. They are before you and it is obvious from your reports that you have already gone into this in depth. I should say, number one, we, or, at least I, do not intend to comment on the problems which manifestly do exist regarding the administrative setup. The new administration which is going to have to be established and matters such as that, that is not a legal problem, it is a financial and accounting problem and a policy question.

Moving on from that, in paragraph (a) at page 5 of our brief, we suggest a simple line be drawn by way of definition of what is a consumer debtor. You have already been into that previously. We think unnecessary difficulties will be encountered with regard to the corner grocery store, the taxi driver, the professional doctor, the lawyer, and so on, the employee who has been speculating in real estate or stocks and bonds. Therefore we suggest it might be better to have a definition which is simply based upon the person being a living human being and having debts of a certain stipulated amount, probably excluding from that definition his debts by way of financing his home—in other words, his mortgage debts.

That definition which is in the bill as presently drawn, making reference to mortgage debts or debts in real estate, raises a problem which we respectfully submit is not adequately dealt with in the bill.

As you are well aware, debts secured on real estate under the present scheme are not admissible in a consumer arrangement. It is quite common for lending institutions to take collateral security by way of land mortgage. Are they or are they not caught by the consumer arrangement? With the bill as presently drawn, I do not know.

I think this is of significance in two ways: one, I think it is helpful to people in proper circumstances to be able to obtain money for necessary expenditures by way of a second collateral mortgage on a real equity in a house which they have. Why should they not be able to do it? So they should be allowed to do it. Conversely, if the bill is left as it now is, one could find a form of abuse creeping in, where something which is really a straight consumer loan, which is meant to be dealt with by this part of the act, would not come within it because the finance company—well, they are more responsible—but other persons would say, "We don't get caught by the consumer arrangements section if we take a real estate mortgage. So let us take a collateral mortgage. It does not matter if there is equity in the house. We will take a mortgage anyway. Then we are secured by real estate and we are not caught by the provisions." So there is a problem which in our submission has not been adequately dealt with and sorted out in the bill as drawn. We also question the present definition of who is a consumer debtor.

Mr. Baird: Excuse me, before you go beyond the issue of the debt secured by real property, how will you distinguish between a mortgage loan secured by real property and what you term a normal consumer debt? It seems impossible to make that distinction.

Mr. Robertson: I agree it is a difficult problem, but I do not think it will create any great improvement in the law to say it is a difficult problem and not find a way to solve it. I think it is one of the things that has to be studied. I bluntly state that I have not yet been able to come up with a way to work it through. In our brief we say we will be delighted to consult with this committee's counsel on the technical question on how we try to do this kind of thing. I do not know the answer.

Mr. Baird: I am not quite clear about why you think the present bill is in error, when it deletes any debt secured by real property. Basically this will take out of the consumer arrangement that type of transaction even where a mortgage is given on property without equity. It would take it away.

Mr. Robertson: I say that it does not cope with the problem. I question whether the policy intends that such a loan should be taken out. It leaves a strange middle ground. I would assume that the thought was, "Let us not cause problems with respect to people buying houses, and the mortgage companies knowing they are going to have a good mortgage, and these provisions of the act will not affect it; that the mortgage will be exactly what it says. So people can still buy houses on reasonable terms and with proper mortgages." Its purpose is to provide special relief where you have consumer loans that have been two-thirds paid off, et cetera. You already know the details.

There is a middle area where you have essentially a consumer loan, but it is collaterally secured on real estate. Which way does it go? I think there should be a way of deciding that. Why should it make a difference whether the consumer loan is secured by real estate or it is not secured by real estate?

Mr. Baird: Could it not be solved by defining a debt secured by real property and not by any other property of the debtor? This would mean that if the finance company was prepared to take chances on a mortgage with no equity, it would lose its right to any other security, or would not have the right to any other security.

Senator Flynn: All debts secured by mortgage are secured also by the personal liability of the borrower.

Mr. Baird: That is correct,

Senator Flynn: The point is, whether there is real security in the collateral or in the mortgage. you have to evaluate your security. If it does not exist in fact, it is transferred in the area of non-secured debts. Do you not as a secured creditor, have to evaluate your security? If it is restrictive, you do not come under the exclusion; your debt remains unsecured.

Mr. Robertson: There is a question, in inflationary times, that what was not security may become security if a person for a period reduces his mortgage and house prices, and so on, inflate. When do you do your determination and so on?

Senator Flynn: You have to do something about your security. You have to say whether you are satisfied that you are entirely secure. If you are not, the excess becomes an ordinary debt.

Mr. Robertson: As I understand the present act, if one has lent to an individual on, among other things, the security of real estate, then you do not have an admissible claim in the arrangement or the composition.

Senator Flynn: You certainly have, if your security does not cover the amount which is due to you.

Mr. Robertson: All I can say is that is the way in which I have read it, and I may be under a complete misapprehension.

Senator Flynn: I would like to ask Mr. Baird if that is true.

Mr. Baird: Yes. There is nothing in the bill that specifically says a creditor can be both a secured and unsecured creditor. This is something which has already been raised in this committee as a deficiency. This is what should be incorporated in this provision. If your secured creditor is secured by real estate, you value your security and that portion of your debt is not covered by the arrangement. The portion of your debt that is unsecured would be covered by the arrangement.

We have to go one step further: what rights do you have when your debt is not covered by the arrangement? Do you have the right to proceed, and sue, to get judgment and garnishee wages, to take the full gambit of enforcement procedures; or are you limited solely to realizing against the property? These are the problems created by this provision.

Senator Connolly: Do you mean to tell us that if a creditor has a security on real estate,—I assume you are telling us that he has the right to execute, to realize, on that security. If there is a shortage at the sale, whatever arrangement is made for the disposal of the real estate, do you mean to say that under the bill as it is presently drafted, if there has been a proposal and an arrangement made, or other assets to be used to satisfy the debt, the secured creditor might even be able to garnishee the wages of the debtor or exercise other rights that were not included in the original security?

Mr. Baird: Yes, that is the way the bill reads at the present time. I think that is the problem to which Mr. Robertson was referring. It comes out in a problem of definition as to what debt is admissible. A debt secured by real property is not admissible and, therefore, the debt is not stayed by the making of a proposal. If the debt is not stayed, creditor has the right to exercise all of his legal rights.

Senator Connolly: I thought the act of bankruptcy protected the debtor in respect of all his assets— the secured for the benfit of the secured creditors; the unsecured then being pooled for the benefit of the other creditors.

Mr. Baird: That is clearly the intention of the bill, but the stay of proceedings generally applies only to debts which are admissible. This not being an admissible debt, the stay of proceeding does not affect it.

Senator Connolly: We are going to have to make this a good deal clearer than the bill proposes at the present time.

Mr. Baird: I think clause 68 causes the problem. Clause 68 reads as follows:

> Upon the filing of a request by a debtor pursuant to subsection 64(3), no creditor of that debtor . . .

And these are the key words.

> . . . who would have an admissible claim if an arrangement were made may, from the time of filing the request, exercise a remedy against the debtor or his property or institute or constinue a proceeding for the recovery of a debt from the debtor . . .

To then determine who has an admissible claim we have to look to clause 78, which provides as follows:

> No claim is admissible under an arrangement by way of extension of time made under this Part where the claim is for a debt secured by,
>
> (a) real property; or . . .

Senator Flynn: That is exactly my point. I cannot see the example given by Mr. Robertson. If the security is worth nothing, what is the advantage in the creditor saying that he is excluded from the arrangement? He will get nothing in the end. The creditor has no interest in

saying that he is excluded from the arrangement if, in effect, his security is non-existent.

Mr. Robertson: May I try to amplify on what I said? I do not want to belabour the point, but I take it the intent here is that in respect of the ordinary man raising a mortgage to buy a house, the mortgage company should be assured that it has, first of all, security on the house and, secondly, his personal covenant and probably that of his wife, and they will not be affected by this at all.

Senator Flynn: The mortgage company is entirely secured.

Mr. Robertson: It does not really matter with respect to a mortgage to buy a house. Things can happen.

I cannot speak for the mortgage companies, but I would have thought that a mortgage company would be very surprised if it were told that once a debtor makes use of this provision, all it has is security against the house, and it has lost the personal covenant of the man and his wife, even though it found out what they were earning and everything else in the ordinary mortgage situation.

Senator Connolly: I realize that in respect of a mortgage there is always the covenant, perhaps not only of the husband but of the wife, too, but once bankruptcy intervenes does the covenant then not become merged, through the process of bankruptcy law, with the rights of other creditors? That is a personal claim; it is not a secured part of the claim.

Mr. Robertson: That is right, but this is a different matter with the arrangement, and so forth.

The question then arises with respect to the consumer loan which is secured by the real estate as well. It may be partially secured . . .

Senator Flynn: Or not at all.

Mr. Robertson: —or not at all, so there has to be provision, as you are saying, for valuation as to how much you are in, how much you are out. The bill as it is presently drafted misses that.

Senator Flynn: This is the present situation. Any security has to be valued, and if you are not entirely secured, you become an ordinary creditor.

Senator Connolly: You become an ordinary creditor in the short haul.

Mr. Baird: I would recommend that we carry on with that approach, even into the consumer-debtor arrangement.

Senator Flynn: As I read clause 78, if the claim is secured, there is no problem; if it is not secured, you give it up and come under the arrangement.

Mr. Robertson: Bearing in mind the limits of time, I will move quickly and try to summarize a few of the other points. The next point we wish to make is dealt with at page 6 of our brief, paragraph (d) where we suggest that there should be a time limit on the administrator in coming forward with proposals. There is none at the moment.

Senator Walker: What do you suggest?

Mr. Robertson: We have not really worked out a time limit, but I would have thought that 30 days would be the maximum time period one would need in dealing with a consumer-debtor, to sort out what his situation is and to come forward, subject to a right, if there are peculiar problems, to apply for an extension. It may be that a shorter period would be appropriate with the right to obtain an extension.

Senator Connolly: An application for an extension of time could be made to the registrar.

Mr. Robertson: That would be the most appropriate office to which to make such an application in respect of a consumer-debtor.

Paragraph (e), again on page 6 of our brief, deals with a question of drafting. I think counsel can deal with it. It deals with the provisions to be put into a proposal. We suggest that the recast, because the administrator, or whichever private trustee it may be who ends up handling these things, he is going to be looking at the debtor's assets, his income, liabilities, and then prorating, and the present language does not work terribly well.

With respect to a bankruptcy situation, as also noted on page 6 of our brief, we suggest that the exemption of $3,000 be increased. We fuel it is too low for our present times and that it should be increased to $5,000 or, some might say, $7,000. That is a policy question upon which I do not think I should comment further.

The other subject with which I wish to deal at this point in time is the matter of discharge. We are now speaking of the discharge of individuals who have gone bankrupt. The relative portion of our brief commences at page 19. Again, being conscious of our time limit, our fist submission is that the concept of the conditional discharge ought to be retained as it presently exists, so we do not have what some people regard as an unfortunate, an undesirable situation, whereby a man who has lived very, very well on a very good income can then be freed of his debts and continue to receive his very good income with no further responsibility after 90 days have gone by, absent, of course, of the filing of a caveat by the administrator. That individual should not be allowed to go on and have a great old life.

Senator Laid: No cross-examination on that!

Mr. Robertson: So I need not pursue that question, I take it.

Then, the next point to which I would refer, is found on page 20 of our brief, with regard to the discharge of debts upon the individual becoming bankrupt. We raise, for further consideration, the question of the deletion of fraudulent debts and so on; about a man becoming freed of fraudulent debts. I have not thought it through, because it is very complex but I am not sure how this act works in combination with an order in criminal proceedings for restitution. Do we then have the criminal running over and becoming bankrupt and saying that the order for restitution, which was made in the criminal court, is of no further effect whatsoever?

Senator Flynn: Does that not exist?

Mr. Robertson: You can get an order of restitution in the courts of criminal proceedings. I am subject to your counsel's correction.

Senator Flynn: I have seen judges imposing a sentence where they will say, "If you repay what you obtained fraudulently, you will be free."

Mr. Robertson: I do not want to pursue it. Your counsel might pursue it, if I can put it that way. I just raise it.

Then, we submit there is an error in clause 233. Our reference is at the bottom of page 20 of our brief where, for some reason, debts which are not released do not share in the bankruptcy's assets. That, we believe, is wrong. They should be shared on a pro rated basis. If they are not released, there is a continuing right.

Mr. Baird: Have you looked at the wording of clause 233 in regard to what is not released?

Mr. Robertson: If I was a wife, I would be really quite surprised to be told that in regards to my arrears of maintenance from my husband, I get nothing out of the assets of his bankruptcy.

Mr. Baird: We are talking about two different points. The first point you raised was that you felt that any claim which was not released by the bankruptcy proceedings should still share in the fund.

Mr. Robertson: Right.

Mr. Baird: If you look at (a), (b) and (c) of clause 233, I do not think any of those debts or obligations should share in the fund.

(a) a fine or penalty imposed by a court;

(b) a debt arising out of a recognizance or bail bond; or

(c) a liability to pay maintenance and support in respect of another person for a period subsequent to the date of bankruptcy or the filing of the proposal.

Mr. Robertson: You may be right if you limit it to that.

Mr. Baird: If you enlarge the scope of debts not released, then your point is very well taken that they both share in the pot and not be released, but only if you are going to enlarge the scope of that section would your comment be applicable.

Mr. Robertson: Right. We are suggesting that there should be consideration given to an enlargement of the scope of that section. We have a suggestion at page 21 of our brief regarding what we would suggest might be apt. We know there is apprehension about lenders coming forward, after a bankruptcy, and then pursuing the ex-bankrupt on the basis that the loan was obtained by misrepresentation.

We think there can be a distinction drawn comparable to the one proposed in one of the new U.S. acts. I will simply refer you to paragraph (b) at the top of page 21 of our brief. Our comments in that regard, in essence, are that a bankruptcy order should not release a bankrupt for fraud or fraudulent breach of trust, excluding the situation where there has been misrepresentation, as to the basis on which credit was obtained by a true consumer debtor, because a consumer debtor sometimes will sign almost anything that is put in front of him. You get into a very fine line as to whether they are really misrepresenting anything. They are pushed by salesmen who are telling them to sign it—"It does not matter. Forget about that!" and then later on it is misrepresentation.

Those are, in the time available, my comments.

Senator Flynn: If you were to provide in this bill that the judge assess the situation with regard to liability resulting from fraud, and, let's say, grant a discharge conditional upon the payment of part of the sum, have a flexible approach to this problem rather than just ignoring it, it is here, I would say a conditional discharge could be applicable to these liabilities resulting from fraud.

Mr. Robertson: That may well be a solution.

Senator Flynn: In principle.

Mr. Robertson: In principle that may well be a solution. The problem you might have is that the court might not want to get into the question of trying a sub-issue on the question of fraud.

Senator Flynn: It is not always easy to identify fraud.

Mr. Robertson: That could well be the case. I am not quarrelling with that. We do submit that the present scheme, where only the administrator decides whether or not the man is going to get his discharge or not going to get his discharge is not sufficient. There ought to be an opportunity for a creditor to more effectively express his views than simply going to the administrator and complaining about it.

In our submission, this does not prevent an exemptions approach. In 95 per cent of the cases there is not going to be anyone objecting. If a creditor is sufficiently worked up that he wants to go and complain about it, again, if you have a registrar — a most apt person to deal with it — we suggest that he should have that right, even though the administrator has not seen fit to file a caveat. The mechanics can be worked out so it does not cost a lot.

That completes my brief submissions.

Mr. Baird: I have one question. The present procedure provides for a judge to hear disputed discharges from bankruptcy. Are you suggesting that that responsibility should be given to the registrar?

Mr. Robertson: I think if it is possible there should be a degree of flexibility. If one can work out a system whereby the registrar, if he thinks that the allegations being made are of such seriousness that they should go to the judge, then he can refer the matter to the judge. Why not start it, even in an opposed situation, with the registrar.

If he decides that the allegations are not serious or just utterly without merit and are based on vindictiveness, then he will say "No" and that may well be it. If he thinks it is serious, well he should say, "Gentlemen, I am going to refer this to the judge". If we have a bankruptcy judge, it will be on his list on such and such a date and up it goes.

Mr. Greenblatt: On this issue, we are probably far more concerned about the situation where no caveat is filed by the administrator at all. Therefore, automatically the debtor is discharged. The input we are looking for and the mechanics we are looking for is where either the trustee, with the consent of the inspectors, or creditors without the consent of the trustee and the inspectors, can make their views known so that a caveat can be filed, in time, by the administrator. If the administrator does not do so, the registrar or perhaps the judge would have a right to file the caveat. Following the filing of the caveat a date of hearing would be set to consider the circumstances.

Senator Flynn: The big problem presently, as you know — I take it, it would remain with the new bill — is that creditors lose interest. If no one cares, the judge is not going to care. Very often the trustee, when he is finished and has been paid, just forgets about it. He does not want

any more trouble. He does not want to go to court, especially if he cannot extract another dollar from the estate.

Mr. Greenblatt: Senator Flynn, in 90 days the trustee is far from being finished with the administration or winding up of the estate. It is in the early stages of the liquidation, or bankruptcy, or insolvency and the creditors do show an interest.

Senator Flynn: Sometimes.

Mr. Greenblatt: In any event, the point we are trying to make is that when someone, either the trustee with the consent of the inspectors, or creditors without the consent of the trustee, want to make an issue as to whether a debtor should or should not be discharged, and they want to have the caveat filed, that they ought to have the opportunity of seeing that such a caveat is filed subject to a hearing to take place subsequently.

Senator Laird: That makes sense.

Senator Flynn: It should be the duty of the administrator or the trustee.

Senator Connolly: Mr. Chairman, it might be appropriate to make the observation that we have here people who are very skilled and experienced in the field of bankruptcy. At best it is a difficult area of the law and, indeed, of business. There are dangers of abuses, the danger of dealing with people losing money which, normally, they should not and it is perhaps important money to them. These gentlemen would not emphasize it, because it is sort of second nature to them, but they are telling us, I gather, that the assurance that the public has by reason of the protective umbrella provided by the normal judicial system is a very important aspect in the conduct of administrative and bankruptcy matters. I think there is an assurance that arises out of this very well-established system that operates, not only with the judges and the registrar, but with the officers of the court at the Bar, which is very important to the general public, creditors and debtors.

The Chairman: Mr. Robertson, if a creditor had the right to file a caveat, would that meet your problem?

Mr. Robertson: That is what we submit should happen; that is right.

The Chairman: That is an affirmative act by him, which is exactly the opposite to vindictiveness.

Mr. Greenblatt: I would not go so far as to grant to every creditor the right to have the opportunity of filing a caveat. This is exactly what the framers and authors of the bill are endeavouring to avoid. They are trying to rehabilitate the bulk of the debtors and if the right is given to every creditor to stop the discharge by being allowed to file a caveat, it would make it much too easy for the creditors to do exactly what the proposed bill intends to avoid.

My limited suggestion was that if there is a justification for stopping a debtor from obtaining his discharge it should be the trustee with the consent of his inspectors who makes the application for the caveat. If there is a body of creditors who would also like to act in cases in which the trustee and inspectors do not act, that body of creditors have recourses under the present legislation. That is, to call a general meeting of the creditors, either to change the trustees or the inspectors and thereby get their licks in as to whether this particular caveat should be filed against any particular debtor.

Senator Flynn: But under this legislation it could be the duty of the administrator if either the trustee or the creditors do not act, because he has a supervisory responsibility

Mr. Robertson: We are really submitting that by some appropriate means the creditors, possibly through the trustee with the inspectors' approval, or otherwise—just how it can get into policy considerations, but through some means or other there should be a right available to the creditors, other than simply talking to the administrator, to get before the courts if at least there are a sufficient number of them, or the inspectors agree. There should be some means provided whereby they can get before the court and say; "This man's discharge ought not to be automatic, for these reasons." The means is a question of drafting and working out the best manner in which to do it.

Senator Flynn: This right exists now and I do not think it is taken away by the legislation.

Mr. Baird: Yes, it is; it gives the power solely to the administrator under the new bill.

Senator Flynn: And the creditor cannot intervene in the proceedings?

Mr. Baird: No.

Senator Connolly: All he can do is complain to the administrator.

The Chairman: Mr. Mayer, you had intended to speak with respect to the position of secured creditors. We have heard a lot in that respect and we have some very definite ideas.

Mr. Mayer: I have been reading the proceedings of your committee, Mr. Chairman, but I have not seen what happened when the chartered accountants appeared. However, I saw what took place when the officials of the department were here during the previous week, and on the whole issue of wage-earner priorities I am just going to say that we do not think it could possibly work. If this is regarded as a worth-while social objective, as it certainly is in some countries now, it should be handled as an insurance scheme. The exact type would be a matter of government policy and detail. However, I have discussed the whole issue of an insurance scheme sufficiently to be really personally satisfied that such a scheme could be established; that it would be workable and would not have to be all that cumbersome. The important aspect of this area is—again, I am going to sound very much like a representative of the secured creditors which the Bar Association is not, and I wish to emphasize that very strongly—that this bill interferes drastically with means of realization by secured creditors, affecting it very adversely. Those who will be hurt by this are those trying to raise credit. The unsecured creditors will not necessarily benefit if there is a bankruptcy, because an efficient realization of secured creditors' assets is often greatly to the benefit of the unsecured creditors. The provisions as drafted will also make it probable that the secured creditors will jump in earlier and provoke things which otherwise they might have waited for.

To deal positively with what should be done, the first question is that there are far too cumbersome delays in enabling a secured creditor to realize. That whole subject basically breaks down to a great extent as to what stays

should be in effect. We have given this whole subject, which is very technical, a great deal of thought and, again, we would be delighted to discuss technicalities with counsel for the committee.

However, we wish to state in very general terms, Mr. Chairman, that we consider that the basic provisions with regard to secured creditors, as they are contained in the existing act, are reasonably satisfactory. Any stay provisions should be simple. We have read the brief of the chartered accountants which was presented to you and, while we have no violent views on some of their suggestions on the subject of stays, we consider that they are too complicated and our suggestions tend to be that there should be as simple a system as possible in order to avoid abuse and complications. We think that there should be not some of the complicated provisions which are contained in the bill, which permit, for example, the entire rewriting of any security enforcement provisions and, in fact, would make it impossible to give any opinion on a trust deed as to the extent to which security instruments are enforceable.

We think, really, two things should be done, and once those are done most of the existing structure of dealing with the secured creditors can be retained.

Firstly, there should be some provision made to facilitate access by the trustee to information. One suggestion that has been made in that regard is that the secured creditor be obligated to very quickly give the basic information, which is what is the security, how much is he owed, at the request of the trustee. This provision should have some teeth in it. One of the weaknesses of the existing act is that there are no real teeth in it. The type of teeth desirable to include is almost a matter of detail and might involve some kind of a penalty.

Mr. Baird: What about the penalty of staying the proceedings until that information is given to the trustee?

Mr. Mayer: We considered that, Mr. Baird, and that type of sanction has a great deal of merit. Beyond that, our basic suggestion for the whole area is that there should be a standard established in the bankruptcy bill providing that a prudent, unsecured creditor must exercise as much care in his realization as a prudent, secured creditor in like circumstances can be expected to exercise. If he does not do that, and the unsecured creditors are hurt as a result, then there should be a remedy in the trustee. If we have those two kinds of provisions . . .

Senator Connolly: I am sorry, I did not follow that. Would you repeat that?

Mr. Mayer: It is in our brief, senator. Basically the suggestion is made that there be set out in the federal bankruptcy bill a standard of care of realization which a secured creditor has to meet and that standard of care is that of an ordinary, prudent secured creditor in like circumstances, and that cannot be contracted out of.

Mr. Baird: On page 12 there is a reference to the standard of care.

Senator Cook: That is a very valuable suggestion. With a provision such as that, it would go along with curing the defects which the bill is trying to correct. It is an excellent suggestion.

Mr. Mayer: It is in the centre part of page 12 of our brief. Once you do those two things, I think the existing system should be left very largely intact.

Senator Connolly: The kind of standard you have in mind is something you would rather talk about with counsel.

Mr. Mayer: The standard is set out in the centre of page 12 of our brief. It is a fairly important point.

Mr. Baird: The Bankers' Association suggested the term "commercially reasonable." Have you any comment to make on that?

Mr. Mayer: I have heard a number of discussions on that. We do not have strong views on some of those fine points.

Mr. Robertson: The point we are making is that this be a standard from which one cannot contract out. If you have that protection, a lot of these other provisions, which are a cumbersome way of doing something, will not be necessary. That is why we suggest it be done this way.

Senator Cook: In other words, there have been abuses in the past by the secured creditor, and this will curb them?

Mr. Mayer: Yes. There have been some abuses. No system of legislation is perfect, but they have been very much overstated. Basically the system has not worked too badly.

Senator Cook: This would provide a certain degree of certainty to the secured creditor?

Mr. Mayer: That is right.

Senator Connolly: We are not the experts in bankruptcy that you people are. Certainly I am not. You say there have been abuses. Could you give us a few examples?

Mr. Mayer: Yes. The allegation is that a secured creditor comes into a situation where he is owed, say, $100. He has $150 worth of security. He makes a completely improvident realization on his security. He gets precisely $100 out of it, whereas if he had taken reasonable care he would have got $150. That is basically the main abuse.

Beyond that, there is another aspect of the realization process on which we would very much like to comment. That is what is known as the dual function of trustees. We feel, first, that provisions with regard to conflict of interest are much better left to the disciplinary power of the superintendent and to the professional associations to which trustees are members, and should not be prescribed in the bill.

Speaking as experienced bankruptcy practitioners, we are strongly of the opinion that on balance it is very often much better for one man to realize business on behalf of a secured creditor, and of an unsecured creditor. You can seriously slow down the realisation and hurt the unsecured creditors in the interest of some kind of academic purity by getting into an over-fine concern about conflict of interest.

We feel these provisions regarding conflict of interest should be deleted. We also feel that there is another provision in the act which looks lovely but which is not likely to work. Whenever a trustee is in a conflict of interest situation, he has to go to court. One way you can delay efficient bankruptcy realization is to make constant court applications. For example, if appropriate notice is given, it is a game as old as the hills that someone who wants to screw up bankruptcy administration will come in and oppose it, and you are involved in a two-month court battle to deal with that issue. Meanwhile the prospective buyer of the

business has gone away and bought something else. We feel that both these things should be dealt with in the way we have suggested.

Senator Cook: If you include your "prudent" provision, the danger of conflict of interest issues almost disappears. There is no reason why the trustee should not act for both.

Senator Connolly: Do you say that the professional associations, the Bar Association and the accounting professions in the provinces, exercise any real disciplinary authority in connection with conflict of interest matters in bankruptcy, or generally, for their members? This is not a bankruptcy question.

Mr. Mayer: I appreciate that. I know of cases which have been taken up before them. Again, nothing is perfect. To answer your question indirectly, senator, trustees are subject to the disciplinary power of the superintendent. I will not pretend that the Bar Association machinery has worked perfectly in every case, because it has not. I want to re-emphasize that life is full of evil. To draft perfect legislation creates as many problems as to leave the existing system undisturbed.

Senator Laird: Some of us are dealing with conflict of interest in another committee. When we have finished, the whole situation will be well taken care of!

Mr. Mayer: I look forward to that.

Another important point is that this bill calls for a substantial increase in what is a secured creditor. It is intended—and it does so in wording which has unfortunately given rise to a lot of ambiguities—to bring into the bankruptcy process certain equipment financing transactions—for example, where you pay for a piece of equipment by rental payments over the life of the asset, and then you get an option to buy it back at the end of the exercise for, say, $1. We, as a Bar Association, have no great problem with that in concept, but we do feel that if this is done the implications will have to be thoroughly thought through, because some of the existing provisions dealing with secured creditors do not deal with this kind of situation.

Senator Connolly: This is a very important commercial practice right now and is growing tremendously.

Mr. Mayer: Yes, senator. That is why I raised it. It needs to be carefully considered.

Senator Connolly: It is not covered by the bill?

Mr. Mayer: It is intended to be covered. If you look at the definition of "security interest" . . .

Mr. Baird: It is in clause 2. "Security interest" is defined as including a lease taken by a creditor to secure payment of a debt. What is a lease taken by a creditor to secure payment of a debt? Normally there is no obligation owing by the lessee to the lessor. He commits himself to rental payments while he is using the equipment, as opposed to a debt outstanding.

Senator Connolly: There are billions of dollars loaned in Canada on capital equipment, to firms which never really acquire title to the property until, as you say, it has become obsolete and they get it for $1 and scrap it.

Mr. Mayer: Senator, your counsel and I have talked about this very briefly. I think we agree that the language of this particular provision is most unfortunate. I am sure I do not know exactly what it means. I believe it is intended to mean what I have said.

Mr. Baird: Would you recommend if leases are included in the category of security interest, that there be specific provisions dealing with the rights of the lessor of chattels as opposed to the rights of lessors of real property? There is nothing in the bill itself to deal with the rights of lessors of chattels.

Mr. Mayer: The answer to that, I think, is that both real property and chattels have to be considered together. This is used as a financing device for real property as well as chattels. Whether those provisions would be the same in both cases, I am not entirely certain. I would suspect that the basic problems are very similar in the two situations.

There is provision like this in the United States under the Uniform Commercial Code, and I know that there has been a good deal of litigation as to whether an interest is a true lease or a security interest. I think if we import this kind of provision into Canada, we should be aware of the fact that there may be a good deal of litigation on this point as a result.

Senator Connolly: I think this is a terribly important point, Mr. Chairman. We received a brief from the Canadian Bankers' Association with reference to the ultimate amendment to the Bank Act, and one of the points it raised was the increasing activity in this field by United States banks which incorporate provincial companies in Canada. Canadian banks, of course, cannot do this, but American banks, through provincially incorporated companies, are doing a multi-billion dollar business in this field.

Senator Flynn: As can any other Canadian company.

Senator Connolly: Yes, other than banks.

Senator Flynn: But it is not limited to banks. The problem is not different because American banks are involved.

Senator Connolly: I think it is important to have it dealt with.

The Chairman: We have noted that, Senator Connolly.

Mr. Mayer: There are two or three other points which I should like to comment on. First of all, we welcome the bringing of the receivership process, to some extent, under the control of the insolvency legislation. It has been suggested to us that we need not comment on that part of the bill at this time.

There are one or two clauses in the bill dealing with preferences which, again, is something we have been told we would not be expected to comment on at this time, but as the subject of preferences slops over into secured creditors, I might as well deal with it at this time.

Clause 161 deals with a security interest for antecedent debts, and we have been assured by the department that this, essentially, is a drafting error and is not significant.

The other clause I should like to deal with at this time is clause 166, which deals with the registration of assignment of book debts. This is not dealt with in our brief, but we have, to some extent, considered it, and, frankly, we think that this clause is in the act for some historical reason and serves no useful purpose at the present time and could be deleted without loss to anyone.

There is also clause 169, which deals with the perfection of security interests, and that, again, is a very technical matter which, I think, is more properly discussed in conjunction with preferences when we come to make our submission on that point.

This proposed legislation is to be a national act. It is, however, differently administered in the various provinces. Therefore, we think it is important that certain criteria be very clearly spelled out in the act, particularly with regard to the stay provisions. We feel that the standards which are presently in the bill should be materially tightened, and it should be stated that no stay will be granted if it materially adversely affects, or significantly adversely affects, the rights of the secured creditors.

Senator Connolly: Using that kind of language in the act?

Mr. Mayer: Yes.

Senator Connolly: You say there is a diversity of standards from province to province, and that despite the fact that the registrars are functioning as well as was earlier indicated?

Mr. Mayer: Yes, Senator Connolly. For example, my information—and one of my colleagues from Quebec may wish to comment on this—is that at the moment it is quite difficult to get a stay in Ontario, whereas it is relatively easy to get a stay in Quebec. This just reflects the different traditions that have been built up over the years.

Mr. Greenblatt: The limit in Quebec is six months under the act, and it is rarely renewed.

Mr. Mayer: There is also one other point. We think the bill is deficient in not dealing with the problem where there is a commercial arrangement and the acceleration provision which says that if a debtor becomes insolvent or takes advantage of any act for the benefit of insolvent debtors the debt is accelerated. That is very much abused sometimes by secured creditors in commercial arrangements, and we feel that if a judge is satisfied that the secured creditor is not adversely affected, then there should be a provision in the bill to not permit a secured creditor to accelerate under those provisions.

There is very welcome provision in the bill dealing with the modification of secured creditors' rights in commercial arrangements which we think will be very valuable. We will deal with that subject further when we deal with commercial arrangements.

The Chairman: Mr. Robertson.

Senator Flynn: Before we go on, Mr. Chairman, I should like to put a question with regard to secured creditors. Everyone is opposed to the scheme which would allow claims for wages to take precedence over the claim of a secured creditor. What is your view as to the constitutionality of that provision, assuming the bill does become law?

This legislation would put the claims of wage earners, up to $2,000 each, ahead of those of secured creditors, notwithstanding that the secured debt was entered into at a time when the debtor was solvent. It is very doubtful that such a retroactive effect would be considered constitutional, if adopted.

Mr. Greenblatt: Senator Flynn, if we could get an answer to that, we would also get an answer to the question as to whether or not one can terminate the rights of a lease in the Province of Quebec which was made at a time when the company was solvent.

Senator Flynn: Yes, except in that case the lessor, generally, would like to get rid of his tenant.

Mr. Greenblatt: But the trustee might like to have the privilege of continuing with the rights and privileges under that lease. Also, if it is disavowed by the trustee, the only recourse that the landlord has is to file a claim as an ordinary creditor for a limited amount of damages, and it limits his recourse as a privileged creditor to a very nominal amount.

Senator Flynn: The second point I wish to raise is in connection with preferred claims . . .

Senator Connolly: I take it there is no answer available on your first point?

Senator Flynn: There is some doubt, at least, in their minds, but there is none in mine. If something was done legally at one point, I do not think that the subsequent state of insolvency should justify the legislation retroactively affecting the rights of the persons who dealt in good faith.

Mr. Mayer: In view of the great width of the insolvency power, no one would feel very comfortable in saying anything in this bill is unconstitutional, though it may be.

Senator Flynn: I know the tendency of the Supreme Court, but that is something else.

The second point I want to raise is in connection with preferred claims. Preferred claims are sometimes considered as secured claims, or preferred, because there is provision in the Bankruptcy Act or in the provincial law. It seems to me that this has been a source of confusion over the years as to whether a preferred creditor whose preference stems from a provincial law should be considered a secured creditor rather than a preferred creditor. I do not think that the proposed bill clarifies the situation at all. Have you any comment on that point?

Mr. Mayer: In general terms, I would have thought that while there may have been doubt on the provincial law from time to time, whether someone was really secured, the jurisprudence was clear that if you were a secured creditor, under provincial law, you are a secured creditor and you would be a secured creditor under this bill, subject to a minor technical point in that the definition refers to a security taken by a creditor as distinct from security vested by operation of the law.

Mr. Montgomery: You have a semantics problem.

Mr. Mayer: I will ask Mr. Montgomery to comment on this.

Mr. Montgomery: I think it is a problem of words. The old Bankruptcy Act talked about secured creditors, and by definition secured creditors included a lot of creditors in Quebec which we cannot call secured at all. They were privileged creditors. They were lumped in with the secured creditors and again under the new act they are. I do not think it is a problem for anyone except for us. I do not think it is a major problem for us either.

Senator Flynn: It is a serious problem. The preference provided in the act sometimes comes into a conflict of interest which may exist.

Mr. Montgomery: It changes the priorities.

Senator Flynn: Anyway, there is not improvement, we are still in the same position.

Mr. Baird: Could any improvement be obtained by varying the definition of "security interest"? Have you any recommendations that would improve the situation?

Mr. Montgomery: No. I think the Bankruptcy Act is essentially going to change some priorities in some provinces—if the government says it is constitutional, and probably it is. It is going to happen; it is unavoidable.

The Chairman: Are there any other questions?

The next heading, Mr. Roberston, is "Commercial Arrangements."

Mr. Robertson: First, I do want to say that we very much commend the attempt being made in this bill to make more effective and provide greater flexibility in commercial arrangements, and in appropriate circumstances, bring secured creditors within the purview if it. We think that the objective of this section of the bill has much to commend it. Unfortunately, it is one of the most complex and technically difficult parts of the bill that one can face. There are many technical questions that still have to be solved in the way it is proposed here.

This particular area is the strongest example of what I referred to earlier when I said that one must remember that one is dealing with a dynamic situation. When you are talking of a commercial arrangement, you are talking of a business that is still going. It is splutering; it is going downhill, and it may soon come to a stop, but it is still going. You have to have flexibility, therefore.

We also think that the concept of the notice of intention has much merit in it, provided there are adequate safeguards that it not be abused. Again, the simplistics approach that you can freeze things, as in the present act just does not work. It has to be refined further.

If a company is a going concern, albeit in difficulty, it is in a situation where probably its suppliers are only supplying on a C.O.D. basis, it has to meet its payroll, its banker is not prepared to extend any more credit. The bank is just on the verge of putting a receiver in, very possibly, and you have the Company in very strapped economic circumstances. You may even have the sheriff or the bailiff knocking at the door. Therefore, a short stay is needed, we agree. We support the proposition.

However, that stay must be such—I do not want to repeat what my friend Mr. Mayer has said about the stay—that it is not unfair either. If I can illustrate what I mean: One can have a situation, to take a simplistic attitude, the inventory is secured to a bank and the accounts receivable are factored to a finance company. Then you have wages that must be paid.

If you have a simple flat stay, and the bank cannot move, the company has got to continue operating or you are not going to have a commercial arrangement. The inventory has to continue to be sold. What happens to the bank's right with respect to the proceeds of sale?

The accounts receivable have to be collected or else you are not going to be able to pay the wages. What happens to the person who has taken security with respect to the accounts receivable that have been collected during that freezing period? He is going to be most unhappy.

The money probably is going to meet the payroll. There is nowhere else that the company can raise it. Therefore, you probably have to have an interim receiver appointed. He may have to have borrowing powers. You have to have a stay provision which works in a fair fashion so that the secured creditors, in particular, are being treated in a way where they cannot say, "this is being grossly unfair to us. We are frozen, we cannot do anything and the company is still continuing to run downhill." Therefore, in our submission, the stay must come quickly before the court.

The most difficult problem in the present proposals, aside from making the stay work in a fair fashion, which can be done given sufficient refinement, is the concept of the class which is brought in. As we understand the bill, there may be going to be classes both of secured and unsecured creditors.

I should have told you that this section of our brief commences at the bottom of page 28. I am not trying to read or follow everything stated therein because I am trying to get on.

The most difficult problem in this whole area is a concept of a class. There is a real definition problem. The definition, if it is supposed to be one, in clause 284(3), in our respectful submission needs refinement and improvement as we have suggested at the bottom of page 29 of our brief. I think that is probably an oversight by the draftsman.

However, there is a real question, as to the advisability of providing a definition of a class.

You can have so many diverse situations in our diverse economy. It may be, as suggested at page 30 of our brief, about the middle of the page, that it is something which should be left to the court in an appropriate fashion. It may be that some middle route can be followed.

I am now ignoring some technical problems, which we will be most happy to discuss with your counsel. For example if a series of debentures was issued and provided for a 66⅔ per cent vote, we see no reason why the 66⅔ per cent vote should not apply instead of the 75 per cent. This is the kind of thing that I am ignoring.

The next practical question is what happens when the vote occurs? Before you get to that point, you do have the section in the act which says that the chairman determines who constitutes the classes. We can see that as being a necessary initial mechanism for the conduct of voting at the meeting, but the true determination of who constitutes the classes—if there is a dispute about it—in our submission should not be left to the chairman, it should be a matter you can get to the court upon, one way or another. It is too vital a matter to be left to the chairman.

That raises the other question of there being a general right of appeal—especially if the chairman is the administrator—from any decisions of the administrator, possibly subject to certain exceptions.

The next point which we deal with, commencing at the bottom of page 30 of our brief is what should happen with respect to voting. The act as drafted, we do not find entirely clear as to what happens with respect thereto. It is quite clear what happens if it is not intended that the proposal or arrangement affect unsecured creditors, there it is clear. If the arrangement is intended to affect secured and unsecured creditors, we are not sure what the result will be if a class of secured creditors vote against it.

We are also apprehensive with regard to the provision in the act providing for voting by unsecured creditors of all classes as one, because they can have different interests if divided into different classes and, as we understand the intent of the legislation, it is possible not only to have different classes of secured creditors but also different classes of unsecurrent creditors. Classes of unsecurred creditors could be based on the priority section, which is 254, which spells out what we used to term ordinary creditors, then preferred creditors. But, as we understand the act, not only can they be treated as separate classes, but with respect to what we nowadays term an ordinary secured creditor it will be possible to divide them into different classes if that makes for a more viable proposal.

Senator Flynn: Have you any examples of a special class of totally unsecured creditors? I cannot see it.

Mr. Robertson: Within the ordinary group?

Senator Flynn: Yes?

Mr. Robertson: There can be merit, sometimes, for saying, "We are going to pay all the little ones, under $200, in total and then give the remainder something."

Senator Flynn: Then the class is defined by the vote.

Mr. Robertson: But in their class, because they will receive 100 cents and be treated as votes for or against with respect to those who are going to receive 25 cents.

Senator Flynn: There is no problem of classification there.

Mr. Robertson: No; I am sorry, I did not make myself clear. I am referring to voting. The bill as drafted provides that when voting on a commercial arrangement or a proposal all unsecured creditors, regardless of class, vote as one.

Senator Flynn: If they are treated the same.

Mr. Robertson: No; that is not what it says, sir. At the moment it provides "regardless of class". Notwithstanding that they have been divided into different classes of unsecured creditors, if the majority of them passes the proposal, it is passed, even though one class of them may have been against it, saying they were being unfairly treated compared to this other class of unsecured creditors. I will look to your counsel to inquire if I have in any way misconstrued the legislation.

Mr. Baird: No; we agree with you completely. It is a problem which should be rectified.

Senator Flynn: But surely it becomes a class.

Mr. Baird: Mr. Zwaig and I have discussed this and we believe that each class should vote separately.

Senator Flynn: Yes, if it is said that one group be paid 50 per cent and another group 25 per cent, these two classes have been created immediately and will vote separately, even if the act does not provide for that.

Mr. Zwaig: The way the bill spells it out is that the class receiving 100 cents can force the proposal through in order to benefit themselves to the detriment of the 25-cent class.

Senator Laird: Gan up on them.

Mr. Zwaig: That is correct.

Mr. Baird: We have a concern that it would be interpreted in that manner and we believe it should be specifically spelled out in order to prohibit such a situation.

Senator Flynn: It seems to me that any logical interpretation would have the desired result.

Mr. Mayer: With respect to Senator Flynn's remark, sometimes we can encouter really difficult problems as to who is properly lumped together into a class. For example, if there are two secured creditors having security ranking pari passu on the same asset, but one has his debt secured also by another debt and the other creditor does not, those two are not really in the same class, because they have markedly divergent interests.

Senator Flynn: That would not be involved in this case; it would be a problem between them, not for voting.

Mr. Robertson: That is where we come down to the question of the definition of class. We agree with the idea of making provision for classes and with bringing secured creditors in to see what can be done in the same way as can be done in the limited circumstances afforded under the Company's Creditors Arrangement Act now and what can be done under the Bankruptcy Act. It is silly not to be able to do it all in one procedure. We thoroughly agree with that. However, this bill provides that a 75 per cent vote of a class of secured creditors can modify the rights of those secured creditors. So the question of who constitutes a class is important, even with respect to secured creditors in this legislation. Mr Mayer was pointing out that there can be people who in one sense are in a class, but one of them has additional security, which puts him economically into a different perspective than the remainder of his brethren, who have only the kind of security which he has.

Mr. Greenblatt: In this regard it should be remembered that under the present act unsecured creditors really have different classes. For example, the bank which may be claiming as an unsecured creditor for $200,000 or $300,000 in the bankruptcy is not in the same position as the supplier who claims for the same $200,000 or $300,000 as an unsecured creditor. The bank could have an outside personal guarantee, which the supplier does not have, yet they both have the same power of voting either for or against the proposal.

Senator Laird: A backer to the note.

Mr. Greenblatt: That is correct, which does not make them secured creditors so far as the proposal is concerned, because they have no security on the assets of the debtor.

Senator Flynn: But the other security must be declared.

Mr. Greenblatt: Even if it were declared that another bank or a very solid person was a guarantor for the debt, if it is not secured on assets of the debtor company, they are an unsecured creditor and have a right to vote.

Mr. Baird: You are saying, Mr. Greenblatt, that it is impossible to legislate equality between creditors because there are so many different positions a creditor may have.

Mr. Greenblatt: And variations.

Mr. Baird: And variations.

Mr. Robertson: I am really up to page 31 of our brief now. To complete what I was saying with respect to the

classes, it is our submission that different classes of unsecured creditors should vote separately. They should not be lumped together. That being said, there is this very difficult problem as to what happens to a proposal after one class of unsecured creditors says no and the other classes of unsecured creditors say yes? That is a problem which must be sorted out.

That raises our next point, which is in paragraph (c) on page 31, that we do submit that when a proposal goes to the court, as we read this act, the court can either approve or reject it. In our submission there should be a clear power in the court in cases in which there are problems to send it back for a further meeting of the creditors after having possibly sorted out some of these class problems.

Senator Flynn: Or rejected.

Mr. Robertson: The court should be empowered to say, "Here is the answer to some of these problems; let us have a meeting of creditors, because this is a living company and let us try to keep it alive."

The Chairman: Would the court not have an inherent power to adjourn the proceedings?

Mr. Robertson: No; I was suggesting, sir, that it would have an express power to send it back to the creditors, not merely adjourn it.

The Chairman: To adjourn it will accomplish the same thing.

Mr. Greenblatt: I do not think they would have the right to adjourn it. The way it is now, it is the duty of the court to either accept or reject. It isn't that the debtor company can come back with another proposal. It is too late. The rejection is automatic bankruptcy. Therefore it is a very serious handicap for the debtor corporation who is trying to reach out for an appropriate scheme for settling its affairs.

Senator Flynn: The rejection would be based on serious facts. A group of creditors would be trying to defraud the minority. That could happen. The rejection would mean bankruptcy, of course but everyone would be on the same basis.

Mr. Greenblatt: We are not dealing with that basis—that would be grounds for rejection anyway—but where it is rejected for economic reasons—where a proposal is not adequately secured, unless the court has the right to send it back for the purpose of considering another scheme of arrangement, that debtor company becomes a dead duck and it goes into bankruptcy.

The Chairman: I do not think we need to labour that point. If the court does not have enough power, give it.

Mr. Robertson: If I might quickly try to complete this subject, at the bottom of page 31 we suggest that it is considered that the 50 per cent vote is not quite the way to do it, a slightly higher majority should be required.

Senator Laird: Sixty-six and two-thirds.

Mr. Robertson: It is a matter of choice. We have another suggestion . . .

Mr. Baird: What is your reaction to 60 per cent? Is there any great merit in one or the other?

Mr. Robertson: I have no reaction.

Mr. Greenblatt: If you want the reaction of the trade associations, they would prefer a two-thirds vote instead of 50 per cent or even 60 per cent.

Mr. Robertson: I next turn to page 32, paragraph two of our brief. It is important to try to save an ongoing company that is in difficulty, and you cannot afford a lot of expense. We think it is important that the receiver be free to act as a trustee under a proposal. He is the man who has gone in to run the company; he knows what is wrong and what can be done to revive it. Why should he not be the person who comes forward with a necessary scheme for putting the company back on its feet? I happen to think that saving companies is one of the most vital and dynamic things that can be done here.

We also should not overlook, in considering commercial arrangement provisions, the impact of other things in the bill. To take a simple example, you may have a company which has 400 employees. If you can cut out certain unprofitable aspects of its business, and so on, which means unfortunately laying off 200 employees, you may be able to save the nucleus of the company and keep the 200 working. If you have a $2,000 per employee preferred claim and it includes severance pay for the 200 whom you have to let go, you may have great difficulty in having enough money to give a decent dividend to the creditors to persuade them to accept the proposal. So one cannot overlook the impact of things that are not in the commercial arrangement sections on the viability of commercial arrangements.

The Chairman: I suppose, Mr. Robertson, you have noted that the departmental officials, when they were here, volunteered the statement that the provisions in the bill in relation to priority—the wage earner, the $2,000 man—were not workable, that it would interfere with the business operations and financing. They asked us to work out an insurance system. All you have to do is read the record.

Mr. Robertson: I am well aware of that, Mr. Chairman. I did not notice in the record an additional reason for doing that very thing I mentioned, which is to help save businesses. We may have to cut some people out.

Mr. Mayer: The point comes back that even if you an insurance scheme, you have the question whether the insurance funds should be subrogated to the claims of the employees, which on the record was left open. I think Mr. Howard said that, on the whole, he preferred that it should not be subrogated. It is a point which has to be considered.

The Chairman: We are looking at that.

Senator Cook: If the insurance companies subrogate it, it does not help the situation at all.

Mr. Robertson: Not if you are going to save a viable company by cutting it back and getting rid of unprofitable operations.

The other thing I have to say Mr. Mayer has already made reference to. It is most important in the context of commercial arrangements that one straighten out the situation—I am now referring to page 33 of our brief—that there be proper provision regarding acceleration provisions so that secured creditors who have those provisions cannot make a proposal impossible, and appropriate provisions with respect to the disclaimer of contracts. Mr. Mayer has also referred to that.

We also submit that if an arrangement is not filed within the time permitted after the notice of intention, then, unless the court otherwise orders, there should be an automatic bankruptcy. The provisions of the bill do not completely work in that they do not say there is an automatic bankruptcy. Therefore, suppose you have an interim receiver, the notice of intention time has gone by, the stay has gone by, yet you have no automatic bankruptcy. You have an interim receiver, but where is he? He is in the middle of nowhere. Those are all my submissions.

The Chairman: Mr. Greenblatt, you are to deal with the last item, namely officers and directors and their liability under this bill.

Mr. Greenblatt: Mr. Chairman, you will find reference to this subject on page 24 of our brief.

At the outset, I must indicate that this Senate committee has quite thoroughly discussed and debated the provisions in the bill relating to the liability of officers, directors and other persons known as agents, and that by and large the sentiments that were expressed by the members of the Senate, and particularly you, Mr. Chairman, and the committee's advisers, Mr. Baird and Mr. Zwaig, are acceptable to the members of our committee.

Briefly, we welcome these provisions, which are found in sections 176 to 178, dealing with the liability of agents; and sections 207 to 209 providing for a mechanism by which agents can be deemed to be bankrupt.

The remedies available in Canada at present are not as extensive as they are at present in the United Kingdom or the United States. There is no doubt that this area needs strengthening. The points outlined in 176, which give rise to the liability for the acts or ommissions of an agent, are very extensive and very vague. While we welcome these provisions, and the philosophy, the objective, and the motives behind the drafting of these clauses, we think it is extremely important that these clauses be so revised and so redrafted so that honest businessmen will not be unduly harrassed. The possibility of such harrassment by angry and unreasonable creditors exists as these clauses are presently drafted.

I need not point out to honourable senators, who are already very familiar with the economic conditions in this country, that care should be taken in the redrafting so that small or medium-sized businessmen or corporations, with limited capital resources, are not driven out of business or discouraged from entering into business. If that happens, then the aim of the proposed Bankruptcy Act is defeated. Instead of protecting the economy and encouraging business development and expansion, it would hurt it.

With respect to civil responsibility arising out of clauses 176 to 178, may I refer honourable senator to page 25 of our brief where we ask that serious consideration be given to imposing the liability on all persons responsible, either singularly or in cooperation with others, for the conduct giving rise to the liability on the directors only and others who are deemed to be agents. We think that the present definition of agents does not cover the situation where parent corporations, for example, and those who are acting on behalf of those parent corporations, who, either alone or in cooperation with others in the corporation, may be responsible or are guilty of conduct giving rise to the liability. That aspect of the definition, we feel, should be taken into account.

We are very much concerned, as I said earlier, with the liability which gives rise to the conditions mentioned in clause 176. The whole of clause 176(1)(a) to (f) is rather vague. It is the opinion of our committee that the liability should only be imposed in those cases involving conduct which was carried out with the intent to impede, obstruct or delay any creditor or in the case where the conduct was such that it involved reckless disregard by the agent of the creditors' interests. In the latter case, we are suggesting that the recommendations of the Jenkins Committee on the Reform of the English Companies Act be followed.

Mr. Baird: I note that section 332 of the English Companies Act, which you have very helpfully provided, talks about fraud. Clause 176 does not go that far. It seems to be some form of lesser misconduct as opposed to fraud. Are you suggesting that a party should only be responsible if he is guilty of fraud, or should he still be responsible if he is guilty of some form of lesser misconduct?

Mr. Greenblatt: In the first place, let me point out that section 332 of the English Companies Act, to which you are referring, deals entirely with situations of fraud, not the situations that are contemplated by clause 176. We are suggesting that some of the remedies provided in that section, some of the provisions contained in that section of the English Companies Act, should be resorted to.

I am not suggesting at all that the only recourse against agents under clause 176 should be where fraud is involved. As a matter of fact, I have deleted reference to the word "fraud" because it is obvious that there would be a recourse in the event of fraud, not only under clause 176, but under the Criminal Code and under the offences under the Bankruptcy Act.

I simply say that if the conduct was carried out with the intent to impede, obstruct or delay any creditor or, more particularly—and this is why we use the word "or"—or if it was done in reckless disregard of the creditors' interests, then liability should attach under the circumstances mentioned—that is, in the event of insolvency or the inability to pay debts.

Mr. Baird: So, you are imposing a test of intent upon clause 176?

Mr. Greenblatt: Yes. Also, under subparagraphs (a) and (f) of clause 176(1) the test of reasonableness was omitted. While we understand that this omission was not intentional, we have to bring that to the attention of the committee.

Mr. Mayer: If I may supplement what Mr. Greenblatt has said, I had a very interesting discussion last week with a leading English barrister who is very much familiar with the workings of that section of the English Companies Act in the United Kingdom. He told me that the practical problem which had been encountered was the proof of intent, and the answer to that, in very large part, I think, is to add, as we have added in our brief, provisions for reckless disregard of the creditors' interests.

In discussing this in our committee, we started off with the proposition as to whether we merely wanted to extend the general fiduciary obligation which any director or official owes to a company so that the creditors can enforce that right. That, superficially, is an attractive proposition, but we came down against it. We felt that it might put too heavy an obligation on the directors and officers. This is a very difficult area. Finally, the compromise solution that

we came up with in our committee was as Mr. Greenblatt has outlined.

Mr. Greenblatt: Regarding clause 176(1), reference is made to "insolvent" in the preamble in the first paragraph, that is to say if the liability is caused by the person or the corporation, when the corporation or person was insolvent or unable to pay its debts. The word "insolvent" used in this context is a rather serious one because we have a new definition in the proposed bill of the word "insolvency," which is not in the present act. If the test of insolvency, as defined now by the act is to be taken into account, one of the tests is you do not value your assets as a going concern, in order to decide whether you are solvent or insolvent; you value your assets on a realization basis. On that basis, some of the most responsible corporations in Canada might be deemed to be insolvent when determining whether certain acts they did or acts they omitted to do attract liability. If the test of insolvency is to remain in the section, particularly with respect to this section, it has to be redefined.

Mr. Baird: There really has been no change between the definition of an insolvent person, in the existing act, and that type of definition in the new act. They are very similar. I have not had problems under the present definition of an insolvent person.

Mr. Greenblatt: The Institute of Chartered Accountants think there is quite a vast difference between the present definition in the Act of "insolvency" and the definition in the present bill. There is a reference to it in their brief and I am merely bringing this point to your attention, Mr. Baird. If it requires a variation, it should be specifically stated in this particular section.

With respect to clauses 207 and 209, which deal with the "deemed bankrupt" status, we are of the opinion that these do not go far enough and that the mere power to deem a person a bankrupt is not a sufficient sanction.

I do not have to point out that what bothers many creditors, generally, in the case of bankruptcies where certain individuals have been responsible in whole or in part for improper insolvency, is their re-emergence in the management of a new business shortly thereafter.

Mr. Baird: Is this not the most common complaint you hear in the credit world, the fact that a person goes bankrupt one day and starts up business the next?

Mr. Greenblatt: Yes, it is.

The Chairman: Well, you haave read what we said about it?

Mr. Greenblatt: Yes.

The Chairman: Do you agree with that?

Mr. Greenblatt: This is at the last sitting, last week?

The Chairman: Our conclusion was that it was a distortion of language to talk about a "deemed bankrupt." What was thought should be done is there should be restrictions, which the court would have the right to impose.

Mr. Greenblatt: This is exactly what we are suggesting, that the court be given the power to prohibit the deemed bankrupt for a limited period, possibly up to two years, from participating in the management of any business. Such a power exists in the present English Companies Act and should be additional to the deemed bankruptcy provision contained in clauses 207 and 209.

The Chairman: We do not believe, at the moment—we have not come to a conclusion—that the words "deemed bankrupt" are the words that should properly be used in this clause. It should be proceeded with on the basis of a power to impose restrictions.

Mr. Mayer: If I may supplement what you are saying, the committee might want to look at section 188(1)(b) of the English Companies Act which deals with this subject. Again, I understand this is a remedy or sanction very commonly applied in English insolvency proceedings.

The Chairman: We will make a note of it.

Mr. Greenblatt: Mr. Chairman, I think while we are on this point of granting the power to the court to prohibit a person from participating in the management of any business for a certain period of time, it is only fair to read the provisions dealing with bankrupts in clause 359 of the bill.

There are certain built in restrictions—whether you call him a "deemed bankrupt" or "bankrupt" or give him any other title—inasmuch as under clause 359 it is a criminal offence punishable on summary conviction for a bankrupt to engage in or carry on any trade or business without disclosing that he is a bankrupt to all persons with whom he incurs debts in the course of carrying on such trade or business. So, there is already that kind of a sanction.

Senator Cook: That would not apply, would it, if he incorporates himself?

Mr. Greenblatt: Well, he cannot incorporate himself. He cannot be a director. He could work for the corporation.

Mr. Baird: He could work for a corporation. The corporation could be owned by his wife or he could work for a business owned by his wife. This type of avoidance or evasion is something you are proposing should be prevented?

Mr. Greenblatt: Right.

Senator Cook: I am just saying that clause 359 does not help you very much. That is really all I am saying. It is easy to get around it.

Mr. Greenblatt: He may escape it by indirectly working through a corporation. Assuming he is not working through a corporation but just going around and carrying on what appears to be some business on more or less a C.O.D. or cash basis, but sooner or later in order to conduct his business, he does have to apply for a certain amount of credit. The failure to disclose to the people, with whom he is dealing, the suppliers, that he is a bankrupt, becomes a serious offence; aside from the fact if he incurs any indebtedness of $500 or more without indicating that he was a bankrupt, it is also an offence.

The Chairman: He could always operate on a C.O.D. basis.

Mr. Greenblatt: I am only bringing clause 359 to the attention of the committee inasmuch as it may not have been considered at the last session.

The Chairman: It was.

Mr. Greenblatt: All right. One other comment we want to make on the question of the "deemed bankrupt" status

provisions. It is contained on page 27 of our brief, subparagraph (c) on that page. We believe that the power of making any relevant application to impose any section on an individual should also be vested in the trustee.

Senator Cook: That is "sanction", is it not?

Mr. Greenblatt: Yes, any sanction on an individual should also be vested in the trustee. At the present it is the administrator who makes the primary decision and takes the first step in declaring that a certain agent should be given the status of a bankrupt.

Mr. Baird: Do you think there is any risk because there are alternative rights and the administrator says the trustee has the right and he will not do anything and the trustee says the administrator has that power and neither will act?

Mr. Greenblatt: In my opinion a prudent administrator will probably make his own decision and will probably act in circumstances in which this status ought to be conferred. However, in the event that the administrator, because of lapse of time, or other duties, or for other reasons, has failed to act, in my opinion the trustee should be given the opportunity to bring this to the attention of the court. He should have, in addition, the right to make the caveat. I do not say that the trustee should act on his own. In order to avoid the type of actions which are unwarranted. It should be the trustee, with the consent of the majority of the inspectors in cases in which inspectors exist, and in most commercial bankruptcies there are inspectors. We are not suggesting that this right also be exercised by creditors, because we feel that if creditors have any views on the subject they should act through the trustee and the inspectors. If a large body of creditors cannot convince the trustee and the inspectors to take a stand on a particular issue it has the privilege under the present act, which is probably continued in the bill, to call a meeting of the creditors and give their instructions to the trustee and the inspectors. If they do not agree to act on these instructions, the creditors could then move for a change of trustee and the appointment of other inspectors.

The Chairman: We have got the point; thank you.

Mr. Greenblatt: I think, Mr. Chairman, these are all the points I wish to make at this particular time.

The Chairman: This concludes our hearing with respect to this subject matter. I thank you, Mr. Mayer and your associates, for the care and attention that you have given to this and for the points you have developed before us. As you can see in following the work of this committee, we have done a great deal of probing and studying. I do not think there is much risk of any one of us becoming expert in bankruptcy and bankruptcy law, notwithstanding the exposure to it we have received. We will consider your statements and presentation and we shall work with matters with which we are more familiar. However, do not conclude from that that we are not going to do a good job and that we do not understand what we are doing. We have good advisers and we can rationalize.

Mr. Mayer: Thank you very much, senator. Certainly nothing I have said was intended to carry that implication. I wished only to point out that this is very complex legislation, but it is in very capable hands when before this committee.

The Committee adjourned.

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1974-75

THE SENATE OF CANADA

PROCEEDINGS OF THE

STANDING SENATE COMMITTEE ON

BANKING, TRADE AND COMMERCE

The Honourable SALTER A. HAYDEN, *Chairman*

Issue No. 69

WEDNESDAY, DECEMBER 3, 1975

Fifth Proceedings on Bill C-2, intituled:

«An Act to amend the Combines Investigation Act and The Bank Act and to repeal an Act to amend an Act to amend the Combines Investigation Act and the Criminal Code»

(Witnesses: See Minutes of Proceedings)

29823—1

THE STANDING SENATE COMMITTEE ON BANKING, TRADE AND COMMERCE

The Honourable Salter A. Hayden, *Chairman*

The Honourable Senators:

Barrow
Beaubien
Buckwold
Connolly
(*Ottawa West*)
Cook
Desruisseaux
Everett
*Flynn
Gélinas
Haig
Hayden
Hays
Laird
Lang
Macdonald
(*Cape Breton*)
Macnaughton
McIlraith
Molson
*Perrault
Sullivan
Walker—(19)

**Ex officio* members

(Quorum 5)

Order of Reference

Extract from the Minutes of the Proceedings of the Senate, October 28, 1975.

"Pursuant to the Order of the Day, the Senate resumed the debate on the motion of the Honourable Senator Cook, seconded by the Honourable Senator Paterson, for the second reading of the Bill C-2, intituled: "An Act to amend the Combines Investigation Act and the Bank Act and to repeal an Act to amend an Act to amend the Combines Investigation Act and the Criminal Code".

After debate, and—
The question being put on the motion, it was—
Resolved in the affirmative.

The Bill was then read the second time.

The Honourable Senator Cook moved, seconded by the Honourable Senator Burchill, that the Bill be referred to the Standing Senate Committee on Banking, Trade and Commerce.

The question being put on the motion, it was—
Resolved in the affirmative."

Robert Fortier,
Clerk of the Senate.

29823—2

Minutes of Proceedings

Wednesday, December 3, 1975
(89)

Pursuant to adjournment and notice the Standing Senate Committee on Banking, Trade and Commerce met this day at 2:30 p.m.

SUBJECT: Bill C-2, "An Act to amend the Combines Investigation Act and The Bank Act and to repeal an Act to amend an Act to amend the Combines Investigation Act and the Criminal Code".

Present: The Honourable Senators Hayden (*Chairman*), Barrow, Beaubien, Buckwold, Cook, Everett, Flynn, Hays, Laird, Lang, McIlraith, Molson and Walker. (13)

Present, not of the Committee: The Honourable Senators Lawson and Smith (*Colchester*). (2)

In Attendance: Messrs. R. J. Cowling and John F. Lewis, Advisors to the Committee.

WITNESSES:

The Winnipeg Commodity Exchange:

Mr. P. K. Huffman, Secretary-Treasurer; and

Mr. G. R. Hunter, Q.C., Pitblado, Hoskin & Co.

The National Association of Tobacco & Confectionery Distributors:

Mr. Paul Tripp, President;

Mr. John Cunningham, Executive Manager;

Mr. Anthony Ross, Economic Consultant; and

Mr. Ronald G. Atkey, Counsel.

Association of Canadian Franchisors and *Independent Grocers' Alliance:*

Mr. Allen Karp, Counsel; and

Mr. Harold Knifton, President & General Manager, I.G.A.

The Committee then proceeded to the examination of the above subject and questioning of the witnesses.

At 4:10 p.m., the Committee adjourned to the call of the Chairman.

ATTEST:

Frank A. Jackson,
Clerk of the Committee.

The Standing Senate Committee on Banking, Trade and Commerce

Evidence

Ottawa, Wednesday, December 3, 1975

The Standing Senate Committee on Banking, Trade and Commerce, to which was referred Bill C-2, to amend the Combines Investigation Act and the Bank Act and to repeal an Act to amend an Act to amend the Combines Investigation Act and the Criminal Code, met this day at 2.30 p.m. to give consideration to the bill.

Senator Salter A. Hayden (*Chairman*) in the Chair.

The Chairman: Honourable senators, the first item on the agenda this afternoon is to hear a submission from the Winnipeg Commodity Exchange in connection with Bill C-2. Mr. Huffman, Secretary-Treasurer of the Exchange, and Mr. Hunter, counsel for the Exchange, will you come forward, please? Mr. Hunter, I take it you have an opening statement?

Mr. G. R. Hunter, Q.C., Counsel, Winnipeg Commodity Exchange: Yes, I have, Mr. Chairman.

Mr. Chairman, honourable senators, the submission of the Winnipeg Commodity Exchange has been filed with you. I do not purport to read it but rather to highlight one or two points. The present Winnipeg Commodity Exchange was originally the Winnipeg Grain Exchange and its origin goes back to 1887. As the brief mentions, it has been a voluntary, unincorporated, self-regulating, non-profit association which has been interested in the grain trade and, in the latter years, in commodity trading in Western Canada.

Under the by-laws, rules and regulations, it is a self-disciplined body, in order to protect the reputation of the industry and its members and to ensure financial stability of those with whom it deals, members and customers.

The functions of the market, regarding futures trading, are set out in the submission and I do not intend to read that.

In 1939 the Grain Futures Act was passed. It was passed as a result of submissions and recommendations made by the Exchange to the government in which the Exchange indicated that it was thought desirable that trading in grain futures should be regulated and supervised.

The Grain Futures Act of 1939 set up the mechanics whereby a supervisor was authorized to be appointed by the Board of Grain Commissioners, as it was then, whose functions, duties and powers were set out in the act. Included in the duties and poweres of the Board of Grain Commissioners, now the Canada Grain Commission, was the right to set aside, vary or amend any by-law, rule or regulation of the Exchange. This was, as mentioned, at the request of and with the support of the members of the Exchange.

In 1939 the only futures trading was in grain. Grain was defined in the Grain Futures Act, as "'grain' means wheat, oats, barley, rye, flaxseed and corn." Those, at that time, were the only grains in which futures trading was taking place.

The situation today is somewhat different. In fact, after 1939, while the office of supervisor under the Grain Futures Act was provided for, a supervisor had not in fact been appointed, although repeated requests and submissions had been made to the government that this legislation, which had really been, in effect, dormant, should be activated, because there were many desirable features of having the exchange regulated and controlled pursuant to the Grain Futures Act of 1939. In September of this year a supervisor was appointed and he is now working as an officer of the Canadian Grain Commission. The proposed regulations are in their third draft, and the Department of Justice, the Canadian Grain Commission and the members of both the Winnipeg Commodity Exchange and the clearing house are co-operating in bringing in a set of proposed regulations for the control, supervision and regulation of futures trading in grain under the Grain Futures Act.

In 1939, as I mentioned, the grains listed in the act were the only ones that were trading for futures on the Winnipeg Commodity Exchange. In 1973 there was a poll of rapeseed producers taken to ascertain whether they wished to remain on the open market, or market their product through the Canadian Wheat Board. The result of the poll was in favour of retaining the open market. An undertaking was given at that time by the minister responsible to appoint a supervisor under the Grain Futures Act of 1939 and to include within the scope of the act rapeseed as a grain. The supervisor has been appointed and, as mentioned, the proposed regulations are currently under review. The timetable is that those regulations will come into effect in January, 1976. We see no reason why this will not take place, Mr. Chairman.

However, the Grain Futures Act has not been amended but a revision of the act is under review. When the act will be reviewed and come before Parliament, we are not in a position to say, nor was the Canadian Grain Commission in a position to advise us as to their timetable.

As mentioned, the position of the Winnipeg Commodity Exchange in 1939 was in favour of this legislation and in favour of the control, regulation and supervision of the marketing of futures. Since then, as mentioned, we have actively supported the appointment of a supervisor and are now co-operating with the supervisor in the preparation of the regulations. We welcome the appointment of the supervisor; we welcome the regulations; and we welcome the proposed revision of the 1938-39 act. However, the Canadian Grain Commission has informed us that this might take some time. If the amendment to Section 32(1), as presently drafted, came into effect, we would be technically in breach thereof because of the fact that our By-law No. 19, dealing with commissions, establishes minimum commissions insofar as they affect all commodities. However, it

also affects certain commodities not presently embraced by the Grain Futures Act in its present form.

I referred earlier to the definition of "grain," in which you will note that rapeseed was not included.

The Chairman: Is the only grain traded in on your exchange not wheat?

Mr. Hunter: No; all those listed are traded, Mr. Chairman. The wheat is marketed through the Canadian Wheat Board, except for domestic wheat for animal consumption.

The Chairman: Yes, that is true: "wheat, oats, barley, rye, flaxseed and corn."

Mr. Hunter: That is correct. However, in 1939 there was no rapeseed being traded and it came along as a later grain.

Senator Walker: Mr. Chairman, would the witness be good enough to inform us, so that it will be easier to follow, what point he is making? Do you mind my asking that, Mr. Hunter?

Mr. Hunter: No, not a bit, senator. The situation is that we have two orphans: rapeseed, which is not a grain as defined in the Grain Futures Act; and gold, which is a commodity. Those are the two commodities that do not fall under the Grain Futures Act. Our intention, and I think that of the Candian Grain Commission, is to endeavour to bring those within the aegis, because we want one supervising regulatory agency.

Senator Walker: For them all?

Mr. Hunter: For them all. The anomaly really is that when the 1939 act was passed those were the only grains in which futures trading was taking place. Since then we have had rapeseed come on and we have had gold.

Senator Walker: Have you made this request previously and had it refused, or is this the first time that you have advanced the proposition that the two should be brought in?

Mr. Hunter: Yes.

The Chairman: Senator Walker, just to make the point, as I understand, the hearing intention is to deal with a section of the competition bill.

Senator Walker: Yes, section 32.

The Chairman: It is not to deal with rapeseed and gold. They are concerned that the minimum commission rule which they have on this Exchange may be in violation of the proposed amendment to section 32 in Bill C-2, or the competition bill, because it is a service and the services are being brought within the scope of the Combines Investigation Act. They are asking us, I expect, to deal with the situation to the extent we can in a manner that they may receive an exemption, exception, or something of that nature.

Senator Everett: As I understand it, Mr. Hunter, you are really dealing with an anomaly here, are you not? From what you say, you in the Winnipeg Commodity Exchange handle eight commodities?

Mr. Hunter: That is right, sir.

Senator Everett: Six of them come under the Grain Futures Act, and therefore, are not affected at all by Bill C-2.

Mr. Hunter: Even when Bill C-2 is enacted.

Senator Everett: That is correct, but two of them, being rapeseed and gold, will be affected by the act. Therefore you will have the anomaly of three-quarters of your undertaking not being affected by the act by virtue of being under regulation of the Grain Futures Act and another quarter of your undertaking being affected by the act. Perhaps you could explain what you are asking us to do.

Mr. Hunter: If Bill C-2, as amended, comes into effect, we will be in breach, because this is an agreement in a service industry to establish certain minimum commission rates; we recognize that. However, because of the existence of the effect of the Grain Futures Act on six of the commodities we are left with two "Orphan Annies"—rapeseed and gold. Therefore, in our submission to your committee, Mr. Chairman, we ask that section 32 (2) be amended by adding a new subparagraph (j), to read as follows:

> the establishment of minimum commissions to be charged by members of a commodity exchange where commodities are traded on an open market.

Senator Walker: That is at page 7 of your brief.

Mr. Hunter: Yes. In considering this, when this was filed in November 1975, we had not had an opportunity of sitting down with the supervisor under the Grain Futures Act. Therefore the regulations will come into effect in January, so we are not concerned. When I have said eight commodities traded, the amendment that we are now requesting is differently worded and, with your permission, Mr. Chairman, I might indicate to the committee what we are now requesting.

Senator Cook: Would it not be easier to amend your own act?

Mr. Hunter: The Grain Futures Act?

Senator Cook: Yes.

Mr. Hunter: Unfortunately, it is not our act, senator.

The Chairman: It is a federal statute.

Mr. Hunter: But they indicate that it might take a year or two years for a complete overhaul.

Senator Everett: Mr. Hunter, you are suggesting that the Grain Futures Act be amended to include these other commodities, rapeseed and gold, but there will be an interregnum, during which time the provisions of Bill C-2 will be in operation.

Mr. Hunter: And we would be a sitting duck.

Mr. R. J. Cowling, Special Counsel to the Committee: Are the minimum commissions on gold and rapeseed fixed at the same level as those for commodities which perhaps do benefit from supervision or regulation?

Mr. Hunter: Mr. Huffman can perhaps answer that, Mr. Chairman.

Mr. P. K. Huffman, Secretary-Treasurer, Winnipeg Commodity Exchange: The rates of commission with regard to the grains and all seeds was set in dollars per thousand bushels, varying between $5 and $6 a thousand bushels. They work out, in relation to the value of their respective grains, to a figure of between one-tenth of 1 per cent and three-tenths of 1 per cent, low and high, depend-

ing on the higher value of one grain and the lower value of another. The gold commissions are $75 a contract on the 400-ounce contract and $35 a contract on the 100-ounce contract. These rates are set in relation to the service performed rather than officially in relation to value or trading volume, or anything like that. By pure coincidence, at today's prices, on gold futures the gold futures commissions also work out between 1/10th and 2½/10ths of one per cent.

The Chairman: Are all the members of the Commodity Exchange required to charge that minimum commission?

Mr. Huffman: Where members of the Commodity Exchange are carrying out services by handling orders for other people—not, of course, for their own account—they charge commissions. The rates I have quoted are the non-member rates of commission. The members' rates of commission, if they perform this service on behalf of another member who in turn may be dealing with the public, are half of that.

The Chairman: My question was: Are the members, whatever business they are doing, required to charge the minimum rate?

Mr. Huffman: They must charge at least the minimum rate.

Mr. Cowling: Or else they would be disciplined.

Mr. Huffman: That is right.

Senator Everett: That is sanctioned, I gather, in the six commodities by the supervisor under the Grain Futures Act.

Mr. Hunter: Under the Grain Futures Act the board, now the Canada Grain Commission, has the power to set aside any by-law, rule or regulation of the Exchange, and the minimum commissions are set out in By-law 19.

Senator Everett: You said you had an amendment to suggest, Mr. Hunter.

Mr. Hunter: Yes. With your permission, Mr. Chairman, we would like to suggest the following amendment rather than the one that appears in our submission. I think it is probably more explicit. We would suggest:

> The establishment of minimum commissions to be charged by members of the Winnipeg Commodities Exchange on futures trading on commodities traded on the Winnipeg Commodities Exchange, provided they are made subject to the same supervision, control and regulation by the supervisor and the board, as provided in the Grain Futures Act, 1939, in respect of grain futures.

I suggest that such an amendment would give us interim protection until such time as the Grain Futures Act is amended. We did not specify rapeseed and gold. We envisage that in the next two or three years, or perhaps even within a year, other commodities may come on to the board for futures trading such as rapeseed oil, rapeseed meal and so on. Not having a timetable from the Canadian Grain Commission, whatever minimums there are, we want to go under the supervision, control and regulation provided in the Grain Futures Act for grain futures.

Senator Cook: There is no difficulty, in principle, in having the act amended. It is only the length of time, is it?

Mr. Hunter: That is right.

The Chairman: I think I should read to you the provision in the Grain Futures Act at this point. It is in section 8(3):

> The Board

That is the Board of Grain Commissioners

> may, where in its opinion a by-law or rule of the Winnipeg Grain Exchange has brought about or is threatening to bring about a condition that is prejudicial to the public interest arising from trading in grain futures, after hearing representations, if any, on behalf of the Exchange, by order revoke or vary any such by-law or rule, but this subsection does not authorize the closing of the grain futures market or any limitation of future trading other than as set out in subsections (1) and (2).

This is the exempting authority. I think your position is that it does not cover the two commodities of rapeseed and gold.

Mr. Hunter: That is right.

Senator Laird: What do you think, Mr. Cowling, from what you have heard? Will it do the trick?

Mr. Cowling: I think I would have to agree. I think the exchange is assuming that the jurisprudence we have talked about in previous sessions is good law and would protect them so far as the six commodities are concerned. In other words, the position of the exchange is that the subsection the chairman just read out is a sufficient regulation to bring them within the scope of the McRuer judgment.

Senator Laird: That is something we ourselves were not too sure of at one stage.

Mr. Cowling: That is right.

Senator Walker: I know in real life there is often a close proximity between rape and gold! Do you not find it odd that the Grain Futures Act should not include gold as well as rapeseed?

Mr. Hunter: It came into being in the Grain Futures Act because that was all that was being traded in as futures. In the period from 1939 up to date we have had potato futures and beef futures, but they have disappeared.

Senator Buckwold: Wheat is also known as prairie gold.

Mr. Hunter: We want to see the act amended so as to embrace anything that could come on as a commodity. The Commodity Exchange definitely wants to be regulated, supervised and controlled; we want one regulatory agency, and it seems to us that the Canada Grain Commission should be that body, since the bulk of our commodities are grain. As Senator Buckwold said, wheat is prairie gold.

Senator Everett: The Grain Futures Act refers specifically to the Winnipeg Grain Exchange?

Mr. Hunter: Yes, it does.

Senator Everett: The Winnipeg Grain Exchange is now called the Winnipeg Commodity Exchange and is the successor of the Winnipeg Grain Exchange?

Mr. Hunter: That is right.

Mr. Cowling: Who regulates silver commodity futures in Canada?

Mr. Huffman: At the moment there are no silver commodities traded in this country.

Mr. Cowling: No, but you can call a stockbroker.

Mr. Huffman: You can do that and place an order for execution in Chicago or New York.

Mr. Cowling: If they have commissions on the silver futures, which I assume there are, the only protection of a broker here is the fact that there is regulation in Chicago or New York. I am talking about Canadian brokers, or even branches of American brokers who operate in Canada. Is that a fair statement?

Mr. Hunter: I do not think we know the answer to that.

Mr. Huffman: I would rather duck the answer to that because it comes into international law. Certainly there is no Canadian regulation of that.

Mr. Cowling: The investment dealers have made a submission to this committee and other places, and as far as I know they did not complain about minimum commissions. That was not a problem for them, presumably because they considered that the provincial securities acts gave them the necessary supervision of minimum commissions. I am just curious about the silver position, which may be another orphan. It does not concern you?

The Chairman: The Toronto Stock Exchange appeared here, but they were not bothered about the minimum commission aspect of it, because they felt they had adequate regulation under the Securities Act of Ontario. Do they have a securities act in Manitoba? I would assume they do. Secondly, do they regulate this exchange?

Mr. Hunter: We do have a Manitoba Securities Commission. The answer to the second question is, no, they do not have anything to do with the Winnipeg Commodity Exchange.

The Chairman: My question was not exactly whether they have anything to do with it.

Mr. Hunter: They do not regulate it.

The Chairman: They do not regulate it. Are you able to say whether there is power in the Manitoba Securities Commission to regulate your exchange?

Mr. Hunter: I am not in a position to give you a dogmatic answer on that. It has been considered, and I certainly believe it has been considered in Ontario, as to whether they can get into that through the Securities Commission.

Mr. Cowling: In any event, it would apply only to those brokers having offices in Manitoba.

Senator Walker: I do not see how this need worry us. We know what they are asking for. We know what they want. We know that they call it the Grain Futures Act. As for the Exchange it is on, why should we worry about it? That is not the problem.

The Chairman: We are not worrying about it. We just want to get the facts straightened out.

Senator Cook: It is just a technical matter. If the proper representations are made to the government, there will be no prosecution.

The Chairman: The point is clear. We understand what, in order to be certain they do not have the Combines people checking their operations and possibly laying charges, they would like to have us recommend. The bill is before us; so it is possible for us to make an amendment.

Senator Walker: There is great merit in what they submit, Mr. Chairman. There is no contradiction.

Senator Everett: Would this be an appropriate time to propose an amendment?

The Chairman: No. We are only hearing submissions. The making of amendments occurs only when we go into an *in camera* sitting and consider how we will deal with a bill and report on it. That will take place shortly. When I say "shortly", I mean in the next couple of days, most likely.

Senator Buckwold: No other Canadian stock exchange deals in the same commodities in the same way that Winnipeg does?

Mr. Huffman: No. We are the only exchange in Canada at the moment dealing with any form of commodity futures.

Senator Buckwold: Your proposed amendment uses the word "Winnipeg", and I am wondering whether it should have a broader reference.

Mr. Hunter: Senator, originally we did say "any commodity exchange", because the Winnipeg Commodity Exchange is the only exchange and it is specifically referred to in the Grain Futures Act as well as the Winnipeg clearing house. We felt that since we wanted to tie in with that act, we should use the Winnipeg Commodity Exchange to ties it into the Grain Futures Act.

Senator Cook: Could we point out, Mr. Chairman, that we understand this is the first phase. There will be another Combines Investigation Act shortly, if anything needs to be tidied up.

The Chairman: The same questions will develop again in phase two. All the same attacks can be developed by amendment in phase two. That is quite clear. That is also your view, is it not, Mr. Cowling?

Mr. Cowling: That is right, Mr. Chairman. It has also been said by the minister before this committee that he intends to avail himself of the right the government has under section 31 to bring the application of the act to services into effect at some time later than the other provisions. We do not know just how long, but if that is the case, there may be time for the Winnipeg Commodity Exchange to have necessary amendments to other legislation. That is one way it could be done.

Senator Cook: We have already debated similar cases with the minister.

Senator Everett: Does the Exchange handle spot commodities?

Mr. Huffman: Yes.

Senator Everett: Could it be said that the Exchange is also involved in the sale of goods rather than just goods and services?

Mr. Hunter: I do not think so. The members of the Exchange trade among themselves or trade on behalf of their customers with other members; but the Exchange, as

such, does not do any trading. It does not sell; it merely provides the auction market.

The Chairman: It provides the facility to carry on the operation.

Mr. Hunter: The spot transactions are between members, but the Exchange, as such, does not undertake any sale of goods.

Senator Everett: If the services section of the act were not proclaimed, would the Commodity Exchange feel safe under that circumstance, or would they still request the committee to amend the act?

Mr. Hunter: The only reason this submission was made was because there was a proposed amendment bringing in services, and we were concerned that our minimum commissions would be in breach once that section was enforced.

Mr. Cowling: There is always the freight forwarders' case. The Supreme Court decision in that case held that although there was a service industry involved, they were dealing with articles. That might apply to your spot silver transactions, but you have never had any investigation by the Combines Branch to date, although there is a possibility that they might have had jurisdiction.

Senator Everett: That leads me to the conclusion that I gather you would only feel safe if the amendment were made to bring those two commodities under the Grain Futures Act.

Mr. Cowling: Except that the Exchange has existed for how many years?

Mr. Hunter: The Exchange has been in existence since 1887; but there has never been any prosecution or investigation by the Combines people.

The Chairman: Depending on the time that may be provided under the bill for proclaiming section 32—which is the section whereby if you violate a provision of the Combines Investigation Act you might be charged—the proclamation will fix the time at which action may be proceeded with under section 32.

When the minister was here the other day, he indicated a period of time before he would proclaim. I did not treat it as being a final statement by him. I regarded it as a sort of bargaining position.

Senator Everett: The requested amendment is to correct an anomaly, and it is always possible that he may proclaim section 32 and bring services within the act before the Grain Futures Act can be amended.

The Chairman: That is possible.

Senator Everett: It is for that reason they are asking for the amendment.

The Chairman: I understand that.

Senator Everett: I appreciate that.

The Chairman: Are there any further questions? If not, I will thank the witnesses.

The next submission is to be made by the Association of Canadian Franchisors. We have Mr. Allen Karp. Mr. Karp was sitting here all morning and we owe it to him that he appear now. Are you going to make a statement?

Mr. Allen Karp, Association of Canadian Franchisors: Yes, Mr. Chairman. On my right is Mr. Harold Knifton, who is President of IGA Canada Limited, which is a member of the association. However, their views are not in all circumstances identical with those of the association and, therefore, you might wish to address some questions or comments directly to Mr. Knifton.

The brief submitted has been previously distributed and I do not propose to review it in any sort of detail, but I wish to highlight a couple of points that I believe should be made. The basis of the brief suggests that discrimination is inherent in the bill, as it stands, against business franchisor relationships as they might compare to chain operations.

The areas of concern deal with section 31.4 which covers exclusive dealing, market restriction and tied selling. Section 38 deals with price maintenance.

It is submitted, Mr. Chairman, that the discrimination inherent in the bill results in competition being fostered amongst small businessman, that is, franchisees, and encourages competition amongst them rather than encouraging their competition against larger chains. I should point out, honourable senators, that a total exemption from these provisions is not sought by business franchisors. What is sought is a distinction that in their view, ought to be made, between the business franchise and the product franchise.

Unfortunately the language that has been used in the trade, and, indeed, in government, has grouped franchise relationships all under one heading. It is suggested that there is a significant difference between the business franchise—which would include such businesses as IGA and their voluntary grocers, Shoppers Drug Mart, Kentucky Fried Chicken and McDonald's Hamburgers, that type of business franchise—and the product franchise which is really a distributorship arrangement which covers the automobile manufacturers, the oil companies and the appliance dealers.

In the business franchise, the franchisor provides trade marks and trade names, its know-how and expertise. It prescribes the marketing system and plan for the franchise and helps the franchisee in its day-to-day operations, and to some extent participates in the control of the business in order to ensure profitability for the franchisee and itself, and also to protect its good will and the good will of the franchisees across the country.

I would point out, Mr. Chairman, that the business franchise is somewhat a unique arrangement, in that it is the only arrangement that I know of where an independent businessman at one end of the country has to protect the good will of an independent businessman at the other end of the country. If you go to a franchise Holiday Inn in Sydney, Nova Scotia and you are treated badly you will not go to a Holiday Inn in Vancouver. Therefore, it is essential that the service throughout the country be of superior quality. That can only be ensured through the franchisor exercising some degree of control over how the franchisees operate.

The product franchise, on the other hand, really encompasses the situation in which a franchisor is really just a manufacturer, manufacturing products and through his "franchise"—which, as I suggested, really is a distributorship—he "captures" the distributor and makes him his exclusive dealer to sell his product. It is the franchisor who is the manufacturer and the franchise mechanism through

which he sells his product. This, as I suggested earlier, deals with the automobile dealership or the oil companies.

Now, the association, in its view, feels that a distinction should be made for the business franchise so that it is not essential, in structuring business franchise relationships, that competition be encouraged amongst small independent businessmen. It is suggested, rather, that the legislation should be framed so as to encourage the business franchise to enable the small businessmen to combine together, through the franchise concept, and compete against the real competition, which are chains.

As an example, it is suggested that IGA, as a group, is there to compete with Loblaws or Dominion Stores or Safeway and not to encourage competition amongst its independent contractors, that is, each little dealer. This is not productive competition in our view under the bill.

The basis of the suggestion, sir, is that a definition be put together. There is before you now an amendment to paragraph (c) of subsection (5), of section 31.4.

Senator Walker: At what page?

Mr. Karp: It is a separate distribution and it is on a long sheet of paper. I believe it is entitled item (c). This was worked out in some detail this morning, therefore, the typing is not superb.

The Chairman: On page 3.

Mr. Karp: It is the third page of the separate handout which came this morning and was not accompanied by the full brief.

The first half of that suggestion is derived directly from the existing amendment which is contained in subparagraph (5)(c)(i) of section 31.4

The Chairman: That is page 18 of the bill.

Mr. Karp: In essence it is suggested that this now defines the business franchise and would exempt from the conditions of the exclusive dealing, market restriction and tied selling the business franchise relationship, that is, a relationship in which the products are either produced by the grantee, for example, the fast food outlets such as Kentucky Fried Chicken or McDonalds; and would also exempt the voluntary groups such as IGA, wherein the grantor of the franchise is the supplier of the grantee, but the grantor obtains products from a multiplicity of sources and, indeed, deals with a multiplicity or products. It then sells these products to the grantee who, in turn, sells them.

I should point out that the amendment as it stands, sir, which was newly introduced into the House of Commons just when the bill was passed on October 16, included paragraph (c) as a new exemption supposedly for the voluntary groups such as IGA. There is some concern that the amendment is not sufficiently clear so as to exempt them or any other franchise relationship. It is suggested that the amendment, as now drafted, would indeed exempt that type of voluntary purchase group and other business franchise relationships.

Mr. Cowling: How would IGA be caught under paragraph (c)(i)?

Mr. Karp: Under (i) as I read it, Mr. Cowling, the products have to be obtained by the grantee, that is, the franchisee from a multiplicity of sources. IGA is the supplier of its franchisees. It obtains products from a multiplicity of sources and then resells them to its franchisees. It is by that method that it supplies its groups; and provides them, of course, with the other services of a franchisor.

The Chairman: Mr. Karp, suppose we take a look at the amendment. We have been calling this amendment the IGA amendment and the Canadian Tire amendment because we felt it was designed to cover such a situation.

Mr. Karp: May I suggest, Mr. Chairman, it should probably be called the Shoppers Drug Mart amendment because, as I read it, it would exempt that franchise relationship and not the IGA or the Canadian Tire.

The Chairman: That does not answer the question, to tell me what you think it covers, and that it does not cover you. Let us look at it, and you tell me why it does not cover you.

Mr. Cowling: Perhaps I see his point, Mr. Chairman. I was rather under the impression that the individual IGA store ordered the competing products themselves directly. Of course, they stock certain IGA products with an IGA label on them. They can also buy Maxwell House coffee or Campbell Soup. They certainly sell that. I was under the impression that they bought those products directly from those suppliers. However, what you are telling us, I think, is that they get those from IGA, and it is IGA that buys from Campbell Soup.

Mr. Karp: That is right.

The Chairman: Even so, if we read the wording here, on page 18, subsection (5), it is intended to provide a form of exemption. You will see that. These transactions that are covered in this part of the bill are reviewable practices.

That is, with reference to the Restrictive Trade Practices Commission, if the Director of Combines Investigation files an application, one basis on which he could was with respect to exclusive dealing, or a refusal to sell to a certain supplier who was in business or wanted to get into business. However, reading at the bottom of page 18, as part of the exemption we find:

> a company, partnership or sole proprietorship is affiliated . . .

If they are affiliated, they have an exemption, subject to the later wording on this page, reading as follows:

> a company, partnership or sole proprietorship is affiliated with another company, partnership or sole proprietorship in respect of any agreement between them whereby one party grants to the other party the right to use a trade mark or trade name to identify the business of the grantee, provided
>
> (i) such business is related to the sale or distribution, pursuant to a marketing plan or system prescribed substantially by the grantor, of a multiplicity of products obtained from competing sources of supply and a multiplicity of suppliers, and
>
> (ii) no one product dominates such business.

Mr. Cowling: It depends who does the obtaining.

Mr. Karp: I think the argument of IGA is that the inference in the section is that the products must be obtained directly from the franchisee from competing sources.

Mr. Cowling: It does not say that.

The Chairman: No, it does not say that.

Mr. Karp: No, it does not say so, but I think the implication is there.

Senator Walker: From what? Implications are difficult to introduce into a statute, of course.

Mr. Karp: Senator Walker, the opening words are "such business is related" and it speaks of "products obtained". I suggest that when it speaks of "products obtained", it speaks of products obtained by such business and the business is a franchisee business, and, therefore, I would infer that the business would have to obtain a multiplicity of products from competing sources, which is not what happens in the IGA system.

The Chairman: No, but the IGA lend their descriptive name to all the businesses that enjoy this agreement, or business relationship with them.

Mr. Karp: Yes.

The Chairman: So, if you are talking about who is the grantor and who is the grantee, under this section who is the grantor—IGA?

Mr. Karp: Yes, that would be IGA.

The Chairman: And the particular business is the grantee?

Mr. Karp: Yes, the franchisee.

The Chairman: Under those conditions.

(i) reads: "such business is related to the sale or distribution, pursuant to a marketing plan or system prescribed substantially by the grantor—" We stop there. That reads of your situation, does it not?

Mr. Karp: Yes, sir.

The Chairman: Then it says "—of a multiplicity of products obtained from competing sources of supply—" That must mean a multiplicity of products obtained from various suppliers. Obtained by whom—by the grantee?

Mr. Karp: Yes, sir; that is exactly how we would read it.

Mr. Cowling: That is what they are worried about.

Mr. Karp: That is exactly what we are concerned with, because in the IGA situation the multiplicity of products are not bought from competing sources of supply. There is a single source of supply; the grantor does all the supplying, but the grantor obtains the products from competing sources of supply.

The Chairman: No; but you are talking about the products; the products are obtained from competing sources of supply?

Mr. Karp: Yes, but not by the business.

The Chairman: Is that so?

Mr. Karp: Yes, that is so, sir.

The Chairman: I think you are covered now.

Mr. Karp: Well, I suggest, respectfully, that there is certainly some confusion, at the very least. It might be considered advisable to just insert after the word "obtained" the words "by the grantor for supply to the grantee or by the grantee", which would certainly clarify any questions that might arise for IGA or any other voluntary arrangement. So that it would not matter whether the grantees or franchisees themselves purchased the product, or it was purchased for them by the franchisor.

The Chairman: Does the agreement between IGA and the particular business in the marketing plan or system prescribed contemplate the acquisition of a multiplicity of products?

Mr. Karp: Yes, sir.

The Chairman: And it does not stipulate the source, does it?

Mr. Karp: Oh, yes, it does; it stipulates the source as the franchisor.

The Chairman: That is the immediate source.

Mr. Karp: Yes, but not beyond that.

The Chairman: Not the original source of the product.

Mr. Karp: That is right.

The Chairman: And the original source could be from competing suppliers?

Mr. Karp: It is. In fact, there is an area in which we could argue that this could be anti-competitive, because the franchisee is locked in. However, in that situation, because it is a voluntary group, upon very short notice the grantees or the franchisees are entitled to re-determine their arrangements, to re-assign their trade-mark rights and obtain other arrangements with other voluntary groups. So, in essence, the power of competition would still exist.

Perhaps I could go on to my next point, which is a somewhat more difficult one. It suggests that the same type of amendment should be considered with respect to section 38, at page 39 of the bill, which deals with price maintenance. If I may summarize the position of the association and IGA with respect to this matter, I shall proceed.

The Chairman: There are a number of subsections.

Mr. Karp: Yes; particularly we are concerned with section 38(4), on page 41. Typically, of course, a chain operation can advertise its price and establish a pricing policy and ensure that the price can be charged for the same goods at every outlet. Therefore, Simpsons can have a national sale and assure the public that a particular product can be obtained for a set price at any Simpsons store throughout the country. The franchisors are concerned that, while they hope to compete with the vast chains, they will not be able to do so because section 38, particularly section 38(4), does not enable them to advertise prices in the same manner, because it could be argued that when they provide advertising for their franchisees they are establishing the price at which franchisees must sell their products. Indeed, I would have to suggest that this is so and it gives me some concern, for instance, for catalogues such as those used by several national franchisors, which print catalogues for their franchisees.

It would appear to me that the established prices of the goods in those catalogues would run afoul of section 38(4), whereas if those catalogues were produced by a chain they would be perfectly legal. It could be argued and, indeed, section 38(4) suggests that if the franchisor when advertis-

ing a national price for a particular sale indicates in the advertising that the goods may be sold at a lower price because of the franchise relationships which exist, that would not be an offence *per se*. It is suggested by the association that this puts them in an unfair situation, since they must do some things which the chains with whom they compete are not compelled to do. Also it indicates to the consumers that there are considerable profits to be earned and that if they shop around franchisees, they can get a better price as this is really not the lowest price that is being advertised and one might do better. This certainly does not put them in the same position as the chains with whom they wish to compete.

Senator Everett: Is that not the whole purpose of resale price maintenance? The franchisor and, indeed, I believe IGA would say that the members of their franchise association are independent businessmen who have banded together under a common name. The whole idea of resale price maintenance is to give the independent businessman the opportunity to set his own price without fear of the loss of supply from those who supply them.

Mr. Karp: That is correct. I would argue that it is perfectly valid in terms of a product franchise when the supplier of the goods is really nothing more than the producer-manufacturer of the product. In that situation he would indeed be guilty of exactly what the bill seems to be directed to.

Mr. Cowling: In a way IGA is tantamount to the same thing. They have acquired products first of all and are re-selling them to the stores. Whether they manufactured them or not seems to me immaterial.

Senator Everett: I think there is a distinction. I have to disclose that I am a franchise holder in what you, I think, call a product franchise. Many product franchises acquire their goods from outside suppliers and supply them to the franchisor. There is not just a simple distinction between what you call a business franchise and a product franchise.

Mr. Karp: I think you are right, but I am suggesting that that is not characteristic. I think it is more characteristic that products are obtained from the manufacturer or assembled by the manufacturer, or in some way obtained by the manufacturer and then put through the franchise outlet.

Senator Everett: You and I may have that distinction in our minds and may be able to agree on it, but we have to define it for the purposes of this bill, and the grave danger is that if we go forward with your suggested definitions it may affect a much wider area of business than you intend to affect, because you cannot really define that nice difference sufficiently for a judge to say, "Now I see it. There is a product franchise here and a business franchise there." It just does not seem to exist.

Mr. Karp: I must agree that it is not easy.

Senator Everett: If it is not easy, we are in the difficult position of putting a clause in a bill which might be enforced in a way Parliament never intended.

Mr. Karp: I think the other side of the coin right now is that you have got a clause in the bill that is somewhat broader than I suggest may have been intended, in that rather than trying to make a distinction between a business franchise and a product franchise the clause now clearly covers the business franchise, which I suggest is not in the interests of the economy in terms of trying to encourage the franchise concept. The consumer likes to know that he can obtain from any source of supply the same goods at the same price. The consumer looks at any Canadian Tire store and does not want to shop between them. He knows that he cal look at a Canadian Tire store and then at a Simpson's outlet and at Eaton's, and each of the others that he considers are competitive sources. As it stands, the bill suggests that not only are Eaton's, Simpson's and the other competitors of Canadian Tire, but Canadian Tire is a competitor amongst itself.

Senator Everett: Then let me ask you this question. Does the consumer consider when he deals with Imperial Oil that the price of gasoline should be the same at each station?

Mr. Karp: No. I suggest that is different.

Senator Everett: I agree there is a difference.

Mr. Karp: I have tried to make the distinction, the same as I feel there is a distinction between car manufacturers. It seems to me that competition between Cadillac dealers is a good thing, and I would not want to include them in the definition of "business franchise." That type of competition is to be encouraged, as is competition between service stations. Therefore, I would include them in "product franchise." I have made some attempt to deal with it, although perhaps it is feeble and I would be prepared to work on it further with your counsel to try to distinguish the business franchise from those cases. Oil companies themselves are the producers of the product; the oil company owns the oil wells, and the oil refineries, and they then franchise a service station to get their product out through the service station.

Senator Everett: I will not prolong the argument, but I should like to make one last point to illustrate the confusion. You talk about car franchises and oil franchises as though they handle one product. Take the parts that are supplied for cars, which are handled both on the franchise of a car dealership and also on a separate franchise that has nothing to do with car dealerships. They are very much ina similar position when you come to this definition that IGA would be in. The supplier buys from a multiplicity of sources.

Mr. Karp: One product predominates.

Senator Everett: No, it is a series of products; they have generators, brake linings and so on.

Mr. Karp: I would suggest we have dealt with that in my definition by saying that one product predominates in the business. I would suggest that surely in a car dealership, where they provide all the service of repair and so on, it is clear that one product predominates, which is the automobile, and that would not be included.

Senator Everett: It would be interesting if counsel would work with you to provide for this. Do not forget, at this stage we are talking about resale price maintenance. The first clause is a technical matter between you and counsel, to see if a definition can be worked out that would be satisfactory to the committee. However, I do have a great difference with you when you start talking in the same way in respect of section 38(4).

Mr. Cowling: It is more of a policy question.

Senator Everett: That is correct.

Mr. Karp: I must agree that the considerations do differ.

Senator Buckwold: I agree with Senator Everett. I really do not see too much confusion about section 38(4), because it says that the advertiser, other than a retailer, must do certain things. I would submit that when an IGA store in my home town of Saskatoon puts in an ad, it is the retailer who is putting in the ad, not IGA; when Canadian Tire puts in an ad, it is the retailer who is putting in the ad. Therefore, I think that solves the problem. Maybe I am over-simplifying it.

Mr. Karp: Perhaps I could clarify that. In a typical franchise relationship a certain percentage, usually of gross sales, or some fee, is paid by each individual outlet to cover national advertising. While individual outlets do sometimes advertise on their own, it is usually with the approval of the franchisor, who scrutinizes the ads. We are here concerned with national advertising so that the sale put on by IGA covers across Canada. On Friday they put an ad in every newspaper in every city across the country advertising bananas at 19 cents.

Senator Buckwold: I say that ad must obviously have different prices in different parts of the country. I doubt if IGA would have the same ad running in Montreal as they do in Vancouver.

Senator Everett: It is not uncommon to see all sorts of ads today that say, "At participating dealers."

Senator Buckwold: Then there is the so-called institutional ad, where somebody puts in an ad where there is a suggested retail price, and it is noted on the ad that this could be sold at a lower price. I do not find this a particularly difficult problem. Eaton's may have a Trans-Canada sale, a sale right across the country, at one price, or they may reflect transportation costs and have different prices somewhere. I suggest it is, say, Eaton's store of Edmonton that is doing the advertising rather than the so-called grantor.

Mr. Harold Knifton, President and General Manager, Independent Grocers' Alliance: Speaking strictly from the viewpoint of IGA, I agree that very rarely does IGA put in an ad across the country to cover all stores, but we will do it in metropolitan areas such as Ottawa, and where they are referring mostly to what we call weekend features, which go in on Wednesday and the prices are operative until the Saturday. We submit it is a normal selling tool in any merchandising, to be able to put in a weekly advertisement to sell loaves of bread for 18 cents for a particular length of time and have all stores comply with that particular advertisement. Steinberg's and Dominion Stores do it, and we would like to do it. If we run afoul of the law, we would like to feel that it would be held that the retailers are responsible and not the supplier, who is the wholesaler.

There is sufficient doubt on this point. We have spoken to many legal counsel about it. There is sufficient doubt that we feel we would be responsible and not the retailer. We are the supplier. We put in the ad. We set the ad, and if it is within the power of this committee we would appreciate your looking very closely at section 38(4) with a view, if possible, to alleviating the situation with regard not only to IGA but voluntary groups, such as Canadian Tire, who are in somewhat a similar situation . . .

The Chairman: We are trying to determine whether you are hurt or if you are hurt at all. I am not sure that you have made it clear. What is to prevent the retailer from advertising?

Mr. Knifton: He cannot advertise on his own. It is too expensive.

The Chairman: If you make an allowance for advertising, do you think that involves you in subsection 4?

Mr. Knifton: We think so.

Senator Cook: No one will prosecute you for advertising a series of bargains.

Mr. Karp: As the section reads, senator, our concern is that it is not proper unless you go on with advertising your series of bargains. Your bargains might even be greater than those of individual stores. If Eaton's or Simpsons or other chain operations do not have to do that, in IGA's thinking, why should it have to do that if its competitive position is reduced?

Senator Buckwold: In my opinion, the advertising is the retailer's advertisement. That is the way the act now reads, and that is the way I would read it. It says that this applies to other than a retailer. When there is an ad in the Ottawa *Citizen* giving IGA prices, that is retailer IGA advertising. I do not see that there is any great problem.

Mr. Karp: All I can suggest is that, in fact, most franchisors take upon themselves—perhaps this is what has to be changed—the advertising for their retailers.

The Chairman: I think, Mr. Karp, we are starting to repeat ourselves.

Senator Walker: But you have done very well. You want refinements of refinements. We will consider it later on. The chairman always does.

Mr. Karp: Thank you, senator.

The Chairman: We know your problem. We have indicated our thinking. That does not mean it is final. That comes when we decide how we shall deal with the bill. We have to test your points. That is what we have been doing. Thank you very much.

We now have with us Mr. Atkey, who is counsel for the National Association of Tobacco & Confectionery Distributors. He is on the far right; and on my immediate right is Mr. Cunningham, who is Executive Manager of the association. Who will make the opening statement?

Mr. John Cunningham, Executive Manager, The National Association Of Tobacco & Confectionery Distributors: Mr. Chairman and honourable senators, we are here as delegates of the National Association of Tobacco & Confectionery Distributors. We are a non-profit business association of small wholesale firms across Canada. With me are two other gentlemen. The first is Mr. Paul Tripp, the president of our association. He is a businessman from Trenton. We have also Mr. Tony Ross, a business consultant, who is with the firm of Kennedy Ross and Associates, who prepared a brief which we presented to Mr. Gray in April, 1974. I regret that the Quebec representatives were unable to be present.

Short of saying that we represent small businesses, may we point out that in recent years our business has been conspicuous by its high rate of attrition. The cause of the attrition we lay at the door of the large corporations which, if they had not indulged in illegal means to accomplish

their objectives, have nevertheless skirted the perimeters of the legal and unfair trade practices so as to achieve a greater share of the market without running afoul of the law.

Senator Walker: We will not challenge that at the moment. Go ahead.

Mr. Cunningham: Specifically we refer to the practice of lost leadering. Lost leadering has been the subject of numerous studies in the U.S. as well as Canada, and suffers because few people really understand what is meant by lost leadering and few are decisive enough to rule upon the practice.

Such is the case with respect to numerous meetings with the many and varied ministers of Consumer and Corporate Affairs, with senior public servants administering the Combines Investigation Act, and with the designers of the new Competition Act, ranging from C-256 to C-27, C-7 and now C-2.

Our reasons for asking that an amendment to Bill C-2 be made have much to do with the case under investigation by the Combines Investigation Branch of the Department of Consumer and Corporate Affairs which we instigated in 1973 and which we consider to be a breach of section 34(c) of the Combines Investigation Act.

Senator Walker: Is that what you are asking—that the section be amended?

Mr. Cunningham: Yes. Actually we are not asking so much for an amendment as an addition to Bill C-2.

Senator Walker: Is that in any of the material we have before us?

Mr. Cunningham: Apparently a copy of our submission has been made available to your committee, and I thought it had been circulated. If not, we will endeavour to see that you get a copy.

Mr. Ronald G. Atkey, Counsel, The National Association Of Tobacco & Confectionery Distributors: Senator Walker, I drafted proposed amendments in a letter to the association, which were to be distributed to the members of the committee. I have additional copies if they were not distributed.

Senator Walker: We should have that.

Mr. Atkey: It is a letter dated March 17.

Mr. Cunningham: Obviously, having watched the two earlier statements being made, we wanted to cut through some red tape. Obviously you are not interested in going into the broad details of it.

Let me say simply that we have tried to get an amendment to Bill C-2. We feel we had tremendous justification for doing so, and it did not get through. We are not here to take another swipe at the cat, because we have already had it voted on in Parliament at one point, or at least something similar to it.

Senator Walker: Which cat? We have a lot.

Mr. Cunningham: We are talking about the fact that we made representations to the Department of Consumer and Corporate Affairs, asking that this amendment be included in Bill C-2. So far we have not been too successful. The reason we want it in is because we now have a case before the Combines Investigation group—we have had it there for two years—against a couple of very large corporations; and if the track record of Combines is consistent, we know quite well it will be discontinued before very long. If it is discontinued, we feel that those two large corporations will go out and indulge in lost leadering again.

The Chairman: Mr. Cunningham, if we brought the point into focus, it may be easier to understand what you are saying. As I understand it, you are not asking us to amend any particular section of the bill. You are asking us to include an amendment somewhere in the bill which would make lost leadering either a per se offence or a reviewable practice.

Mr. Cunningham: Precisely. I think I should turn it over to Mr. Atkey to clarify our position in that respect.

Senator Cook: Do I understand that this request has already been turned down in the Commons?

Mr. Cunningham: Not precisely as we presented it, that was the point. We wanted them to consider loss leadering. We had Mr. Rodriguez present the matter at second reading. It had been voted on, 182 against and 18 for.

The real problem was that in all of our correspondence over the past year or two, we had more than 50 per cent of the members of the House of Commons who indicated they would support it if it came up.

The Chairman: Mr. Cunningham, we are not interested in that. Let me tell you what the present situation is. We had the minister here and we questioned him on, among other subjects, loss leadering. Here is what he said. This was just a few days ago, November 19, 1975. We knew what the points here were, with which we would be concerned.

Mr. Ouellet said:

> I do not want to duck the question at all; quite the contrary. It is an important area. It is public knowledge that in phase two we will be dealing with loss leadering. I have indicated this in speaking to the other place that this would be one of the subjects of study and action in phase two. We will also be dealing with price discrimination in phase two. We will come back to the subject at that time.

Mr. Atkey: Mr. Chairman, could I make a comment?

Senator Laird: Excuse me, Mr. Atkey, before you go on. Could I get from Mr. Cunningham the nature of the membership in this association, and how it finds itself in an unfortunate position in relation to large companies? I think you should name names. Who is your association? Is it a small group of retail tobacco companies?

Mr. Cunningham: A few years ago we appeared before this committee and we were successful with regard to the White Paper on Taxation in defining small businesses as those businesses whose net profit is less than $100,000 a year.

Senator Laird: Are they companies who are members of the Association of Tobacco and Confectionery Distributors?

Mr. Cunningham: Wholesalers.

Senator Laird: I am trying to place it with reference to someone in my home town.

Mr. Cunningham: And where is that?

Senator Laird: Windsor. Morton Tobacco.

Mr. Cunningham: Morton Tobacco is definitely one of our members.

Senator Laird: That is what I was trying to get straight.

Senator Cook: In that case you are okay.

The Chairman: Well, he did not say that.

Senator Laird: Not yet anyway.

Mr. Cunningham: I do not know what party Morton Tobacco supports.

Senator Walker: If they are smart, they support both. Mr. Atkey sometimes is a very able counsel.

Mr. Atkey: Honourable senators, the chairman made a reference to this matter coming before the committee on November 19 last. It was really the minister's response to your counsel at that time that prompted this association to want to come forward. In the minister's reply to Mr. Cowling's question about the affiliates exemption, as not being applicable to the price discrimination section, we detected a sympathy with independent distributors of gasoline. The reasons for his sympathy were not articulated at that time. The reason for not putting in an affiliate exemption in section 34 was somehow to protect the independents.

We think—and I am speaking on behalf of the association—that that is a justifiable reason for doing what he did with section 34, but we would further suggest that the same reason obtains in respect to the problem of loss leadering. If he is concerned about the independents in the case of the affiliates exemption in price discrimination, he should also be concerned with respect to the problem of loss leadering.

Mr. Cowling: To be consistent.

Mr. Atkey: That is right. Mr. Cunningham has pointed out that there is an investigation of particular cases before the branch, which have been there for well over two years. With respect, senator, I do not think it is appropriate to name names since this association has been the one that prompted that particular investigation.

Senator Laird: Perhaps they are suppliers to members of your association.

Mr. Atkey: I am not sure whether that is the case. The point is that there is one section, section 34(1)(c) that deals with predatory pricing. There have been numerous complaints brought under that section. There have been, in total, three prosecutions and none of them has been successful because of the judicial interpretation given to the language of that section.

I do not propose to go into it, but this association thinks that the problem of loss leadering is such that it requires one of two things: either a reworked version of section 34(1)(c), which is the first amendment that I have before you in page 2 of my letter; or, alternatively, if a *per se* offence is regarded as too blunt an instrument to deal with the problem—I think there is some good reason for suggesting it is too blunt—then you should look at the civil jurisdiction of the Restrictive Trade Practices Commission to deal with loss leadering in a more discretionary fashion, in the same way as it will be dealing with exclusive dealing, market restriction and tied selling.

Senator Everett: Well, let us deal with section 34(1), and we can get to the others.

> 34 (1) Every one engaged in a business who
>
> (c) is a party or privy to, or assists in any sale of a product at a price below acquisition cost plus actual costs of overhead and selling expense
>
> is guilty of an indictable offence and is liable to imprisonment for two years.

That would rule out, for example, sales of excess inventory.

Mr. Atkey: If I might give you a legal answer to that: It depends. In some cases, where that excess inventory was part of the total unit, where in assessing the cost of that total unit the entrepreneur had sold at a profit, so to speak, but took a rather large profit on the first 60 per cent of the goods coming into the shop and sold the rest at a low cost, the total profit to him on those units of that single product would not be a loss leader as defined here.

Senator Everett: That may be, but that still leaves you with all the bad parts of loss leadering that you want to get away from. Secondly, there is no guarantee that a buyer is going to be able to buy merchandise and sell it for a profit. For example, a department store can buy a line of dresses and from the first instance they do not sell, and then they clean them out and get their money back into something that does sell. Under your definition, that would be loss leadering despite the fact that it is a normal merchandising practice.

Mr. Cunningham: It would certainly be loss leadering if they were using that as a means of gaining an advantage in the market.

Senator Everett: That is an interesting point of view that you have, but a judge, I am afraid, would not have the luxury of saying that. Section 34(1) as you have drafted it, is pretty clear.

Mr. Atkey: I would just say, senator, that you are looking at the section in isolation. It is an open question as to whether you would have a "due diligence" section surrounding this. So, there would be, in the sort of example that you hypothecate, a defence available to the merchandiser in cases where he was unable to sell at cost plus his overhead and selling expense.

Senator Everett: I think you would have to agree it is a pretty blunt instrument, if he has to use "due diligence" to defend himself against it.

Mr. Atkey: It is a very serious problem.

Senator Everett: Yes, it would be.

Mr. Atkey: As a legal draft, this is a blunt instrument. My own preference, indeed, it was the preference suggested to me by several members of the House of Commons committee, when this association appeared last February, that the discretionary jurisdiction of the RTPC was a more appropriate way of dealing with this particular problem.

The association has come to the position, after having lived with this problem for some considerable period of time, that that might be quite acceptable to them. It was in that light that I drafted the proposed amendment to section 31.4.

The Chairman: Have you anything more to add, Mr. Atkey?

Mr. Atkey: I think that pretty well completes the submissions, Mr. Chairman.

I do not know what disposition this committee is going to make of the failure of the present bill to contain the affiliate exemption for section 34 but, as Mr. Cowling has said, this is a matter of consistency. It is really whether this bill has any sympathy at all for the small independent wholesaler or retailer. We detect, as I said earlier, a sympathy for the distributor in certain products, in particular, in the oil and gas industry; with a distributor who is independent seen as having a certain right, if not economic, a social right notwithstanding his continued existence may lead to higher prices.

It is just not lower prices that is the focus here, it is the very livelihood of a group of small and independent businessmen that is at stake. That is the principle involved.

Mr. Cunningham: I might point out, gentlemen, that our objective is not to create another system of resale price maintenance. All we are really asking for is a very basic protection through this amendment that large firms could not sell products at a price below their absolute bone cost plus a "reasonable"—and that can be defined—allocation for overhead.

This does not build profit into it at all. It might be well below the profit line, but it protects us from the very large corporations coming along and precipitously cutting prices, making a sideline out of the main line that the smaller people are carrying and putting them out of business. This is a practice which has been going on for a long time. In the brief which we presented to Mr. Gray, we indicated a decline of small independent business throughout the years and the growth of the large corporations. We contend that the causes of it have been practices such as this and particularly this one, loss-leader selling.

The Chairman: Well, at least, Mr. Atkey, your position has gone this far: The minister does not say how he will deal with loss-leaders, but that next time around it will be contained in phase 2.

Mr. Cunningham: We felt it would be more appropriate in this particular section.

The Chairman: But do you understand what phase two means? It means more amendments to the present act. These are amendments to the present act, and phase two means more amendments to the present act. So we are dealing with the same general subject matter, the combines legislation. If the minister says that this is part of phase two and says it in print, we have to accept that statement as being an honest statement. However, we must decide whether in all the circumstances, as we consider it, we feel we should proceed to make an addition to the bill at this time. That is a decision we will have to make in committee.

Senator Walker: With the session ending on January 10 it would be rather late, would it not?

The Chairman: No; the Christmas recess commences on December 19.

Senator Walker: I understand a new session will commence after that

The Chairman: That will be toward the end of January and there will be a new bill, as this was.

Senator Walker: And that will be the second phase?

The Chairman: Yes.

Senator Walker: Then they get in on that and their arguments made now will be taken into consideration at that time.

The Chairman: The great practice is that the Senate conducts a hearing concerning the subject matter and usually that has been done, the study completed, the report made and amendments recommended before the Commons gets half way through consideration of the bill. Then we find, as was the case in connection with this bill, that many of the amendments we suggest are incorporated. Some are not, but it is not often that your batting average is 100 per cent, although it was in connection with another bill. So the idea is that we start early next time, as we always do on these matters, as you know, Senator Walker.

Senator Walker: Yes, always.

The Chairman: Certainly the moment phase two comes into being this committee will be busy studying the subject matter, and aspects we will be looking for, certainly, will be those aspects mentioned by the minister as to be included in phase two.

Senator Walker: I suppose you would like to finish now, so that we will have it all for phase two.

Mr. Cunningham: You are right on with that. Certainly we would like to put it in the next phase, and we feel that you would be wonderful policemen for it. The real fact, however, is that we would like to include it as an amendment in this bill, if possible, because we are afraid that during the time before the next phase is concluded we might lose a lot more players.

Mr. Atkey: The subject of loss leadering is not new in this country.

The Chairman: It is not new as a practice anywhere, is it?

Mr. Atkey: No and this was considered carefully during the McQuarrie commission in the early 1950s and referred to the Restrictive Trade Practices Commission. Their report said that, based on the industry as they found it at that time, it was not really a problem and they did not recommend that any steps be taken. Since 1955, when that report came in, the structure of the industry, particularly food retailing, has changed rather substantially. I think we are probably all aware of the degree of concentration which exists now that was not present at that time. Yet we have had a succession of ministers and governments on both sides of the house say, on the basis of the report of the commission in 1955, that it is not a problem but they will continue to consider it at the next session, or phase two, or whenever the occasion arises.

This association submits that over the past four or five years members of this industry have been hurt rather badly, and it is about time that the Parliament of Canada came to consider the problem in a 1975-76 context. The association really feels that a succession of ministers and governments have put them off, and it has been much too long.

Senator Laird: Mr. Atkey, I hope you do not mind my saying this, speaking only personally: I am certainly in favour of giving all assistance possible to the small operator, but I could not accept your proposed amendment for section 34(1)(c) as it is presently worded. It is just too

rich. Now, how you might get around that, I do not know. Therefore, if you ask us to do this right now I would be one member of the committee who would say that I cannot go along with that wording as a solution to the problem, yet I am quite anxious to see a solution to it.

Mr. Atkey: This is merely to say that the amendments proposed at pages 3 and 4 of my letter to put these matters of tied selling or loss leadering under the RTPC is the acceptable manner in which to do it and obviates the rigidity to which the senator referred.

Senator Laird: It might, yes.

Mr. Atkey: And, of course, as I am sure you are aware, many of these under 31.4(1) really depended on what happened at the RTPC and how that particular board behaved, which is entirely speculative at this time.

The Chairman: We have no further work to do, but the committee will meet tomorrow morning at 9.30, *in camera*, to deal with Bill C-2. We will look over the entire bill and see what submissions and matters are to which we should address ourselves, particularly in anticipation of having to prepare our report within the next week or 10 days.

The committee adjourned.

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FIRST SESSION—THIRTIETH PARLIAMENT
1974-75

THE SENATE OF CANADA

PROCEEDINGS OF THE

STANDING SENATE COMMITTEE ON

BANKING, TRADE AND COMMERCE

The Honourable SALTER A. HAYDEN, *Chairman*

Issue No. 70

TUESDAY, DECEMBER 9, 1975

Sixth & Final Proceedings on Bill C-2, intituled:

"An Act to amend the Combines Investigation Act and The Bank Act and to repeal an Act to amend an Act to amend the Combines Investigation Act and the Criminal Code"

REPORT OF THE COMMITTEE

(Witnesses: See Minutes of Proceedings)

29884—1

THE STANDING SENATE COMMITTEE ON BANKING, TRADE AND COMMERCE

The Honourable Salter A. Hayden, *Chairman*

The Honourable Senators:

Barrow	Hayden
Beaubien	Hays
Buckwold	Laird
Connolly (*Ottawa West*)	Lang
Cook	Macnaughton
Desruisseaux	McIlraith
Everett	Molson
*Flynn	*Perrault
Gélinas	Smith (*Colchester*)
Haig	Sullivan
	Walker—(19)

**Ex officio* members

(Quorum 5)

Order of Reference

Extract from the Minutes of the Proceedings of the Senate, October 28, 1975.

"Pursuant to the Order of the Day, the Senate resumed the debate on the motion of the Honourable Senator Cook, seconded by the Honourable Senator Paterson, for the second reading of the Bill C-2, intituled: "An Act to amend the Combines Investigation Act and the Bank Act and to repeal an Act to amend an Act to amend the Combines Investigation Act and the Criminal Code."

After debate, and—
The question being put on the motion, it was—
Resolved in the affirmative.

The Bill was then read the second time.

The Honourable Senator Cook moved, seconded by the Honourable Senator Burchill, that the Bill be referred to the Standing Senate Committee on Banking, Trade and Commerce.

The question being put on the motion, it was—
Resolved in the affirmative."

Robert Fortier,
Clerk of the Senate.

Minutes of Proceedings

Tuesday, December 9, 1975
(92)

Pursuant to adjournment and notice the Standing Senate Committee on Banking, Trade and Commerce met this day at 9:30 a.m. *in camera*.

SUBJECT:—Bill C-2—"An Act to amend the Combines Investigation Act and the Bank Act and to repeal an Act to amend an Act to amend the Combines Investigation Act and the Criminal Code".

Present: The Honourable Senators Hayden (*Chairman*), Beaubien, Flynn, Macnaughton, McIlraith and Molson. (6)

In Attendance: Messrs. R. J. Cowling and John F. Lewis, Advisors to the Committee.

The Chairman drew to the attention of the Committee the text of a letter received by him from the Honourable André Ouellet, Minister of Consumer and Corporate Affairs respecting the above Bill; following discussion, it was *Agreed* that the letter be appended to the Report as Appendix "B".

The Committee then proceeded to the examination of a draft report respecting the above Bill, following which, and upon motion duly put, it was *Resolved* that the Report, after certain revisions made thereto, be presented to the Senate.

Upon motion duly put, it was *Resolved* to report the said Bill, without amendment.

At 11:00 a.m., the Committee adjourned to the call of the Chairman.

ATTEST:

Frank A. Jackson,
Clerk of the Committee.

Report of the Committee

Wednesday, December 10, 1975.

The Standing Senate Committee on Banking, Trade and Commerce, to which was referred Bill C-2, intituled: "An Act to amend the Combines Investigation Act and the Bank Act and to repeal an Act to amend an Act to amend the Combines Investigation Act and the Criminal Code", has, in obedience to the order of reference of Tuesday, October 28, 1975, examined the said Bill and, for the reasons hereinafter mentioned, now reports the same without amendment.

Bill C-2 as passed by the House of Commons comes as no stranger to your Committee, the subject matter thereof having been referred to it for advance study on March 27, 1974 and again, in the present Parliament, on October 16, 1974. On March 19, 1975 the first Interim Report[1] of your Committee was tabled in the Senate and a second Report[2] tabled on June 26, 1975.

Bill C-2 proposes extensive amendments to the *Combines Investigation Act* and is said by the Government to comprise what has commonly been described as "Phase I" of contemplated amendments to that Act. The effect of these amendments is to . . .

a) bring service industries and the professions under the scope of the Act,

b) create certain new offences relating to combines,

c) make certain trade practices "reviewable" by the Restrictive Trade Practices Commission,

d) provide a civil right of action for violation of the Act,

e) expand the jurisdiction of the Federal Court of Canada with respect to combines matters,

f) strengthen the law with respect to misleading advertising and representations, and

g) providing more severe punishment for infringement of the Act.

Further amendments to the Act, commonly referred to as "Phase II", relating particularly to mergers and monopolies will be introduced, according to the Government, during the next session of Parliament. With the introduction of Phase II, most of the ground covered by Bill C-256, the *"Competition Act"* (which was introduced as a comprehensive overhaul of the *Combines Investigation Act* nearly four-and-a half years ago, but not proceeded with) will have been traversed in slower, and therefore for those affected less painful, but possibly just as comprehensive fashion.

[1] Committee Proceedings Issue No. 33 and Appendix to Hansard, March 19, 1975.

[2] Committee Proceedings Issue No. 47 and Appendix to Hansard, June 26, 1975.

As stated in the first Interim Report on the advance study, your Committee had the advantage of considering a great many submissions from a cross section of companies and associations; a list of briefs and appearances is attached as an appendix to the first Interim Report. In addition, your Committee heard evidence by the Director of Investigations and Research under the Act, Mr. R. J. Bertrand, and other members of his Department. As a result of those hearings your Committee made in its first Interim Report on the advance study a number of recommendations for amendment to the Bill before it was passed by the Commons. The Bill in the form finally adopted by the Commons responds to an appreciable number of the most important concerns and recommendations of your Committee with respect to the Bill as originally introduced.

The Bill was referred to your Committee by the Senate on October 28, 1975. Your Committee since that date has had seven sessions during which it has heard five further submissions from the parties listed in the Appendix. In addition, three sessions were devoted to the evidence of the Minister responsible for the legislation, the Hon. André Ouellet, Minister of Consumer and Corporate Affairs.

No new concerns have been identified by your Committee since the Bill itself was referred to it which have not already been described in its two Reports on the advance study with the exception of a minor technical matter in connection with the punishment provisions arising out of amendments made in the House of Commons during the debate on the report stage on the Bill.

Your Committee's principal task has therefore been to assess the effectiveness of the amendments made in the Commons in meeting the recommendations outlined in its two previous Reports and deciding what action should be recommended with respect to those which have not been reflected.

Among the recommendations made in the Interim Report which your Committee considers have been fully met by amendments to the Bill made in the Commons are the following:

1. Restoration of the refusal to sell defences under the resale price maintenance provisions (new subsection 38(9), clause 18, p. 42).

2. Provisions making the Commission a Court of Record for purposes of its jurisdiction in connection with reviewable practices, requiring that the burden of proof in applications before the Commission under the reviewable practices jurisdiction shall be on the Director of Investigation and Research (except where the applicant is a supplier seeking modification of an order) and clarifying that parties before the Commission have the right to cross-examine witnesses called by the Director and to

call and examine witnesses and produce documents on their own behalf (new section 31.8, clause 12, p. 23).

3. Provision of a right of application by a supplier against whom an order has been made under the reviewable practices provisions to apply for modification of such order. (new section 31.9, clause 12, p. 23).

4. A re-drafting of part of new subsection 31.4 (2), clause 12, pp. 16 and 17 clarifying the circumstances under which an order respecting the practices of exclusive dealing or tied selling may be made[1].

5. Removal of a provision whereby the consent of the person calling for tenders to a joint bid would have to be obtained prior to submission of the tender (new section 32.2, clause 15, p. 27).

Among the recommendations of your Committee which were partially met by amendments made by the Commons were the following:

1. *The provision of a defence of "due diligence" with respect to certain offences which would have otherwise carried strict liability.*

This was perhaps the most significant of the concerns expressed by your Committee and its recommendation has been implemented to a substantial degree in the amendments made by the Commons. The offences in the present Act with respect to misleading advertising and representations and as amended by the Bill are provided for in such a way that, contrary to typical criminal offences, *mens rea*, or, criminal intent is not an ingredient which must be established by the Crown. The amendment containing the "due diligence" defence appears as new section 37.3 in clause 18 of the Bill on page 39. With the exception of the word "forthwith" in paragraph 37.3(2)(d), your Committee is satisfied that the amendment meets the concerns expressed by your Committee. The Minister and his officials argued that there was sufficient flexibility in the word "forthwith" that there would be no undue hardship and that to remove the word would open the door to abuse by the unscrupulous. It may be that the courts will interpret the provision in the manner suggested by the Minister and, if so, there will be no difficulty. Instead of an amendment to delete or replace the word "forthwith" your Committee recommends that no action be taken at the present time and that court decisions under the section after enactment be monitored to ascertain whether the defence is meeting the concerns for which it was inserted.

2. *Exemption for affiliates.*

Your Committee proposed that the exemption in the Bill in respect of dealings between affiliated persons and companies under the resale price maintenance provisions (new subsections 38(2) and (7) on pp. 40 and 41, clause 18) be extended to other offences in the Act and in the Bill since, otherwise, by implication, dealings between affiliates might constitute commission of the offence. This proposal was recognized in the Commons amendments with one exception. The exemption was not extended to sales between affiliated companies for the purposes of the price discrimination provision, section 34 of the Act. In other words, the clear implication as a result of this ommission will be that, e.g., a parent company may not be able to sell to a subsidiary at a lower price than it would to an arms-length customer. The explanation given by the Minister was that allowing sales to subsidiaries at a lower price would tend to weaken the position of arms-length customers of the parent company who compete with the subsidiary. In other words, the possibility of lower prices to the consumer should yield to the creation of conditions to improve the status of independent dealers. This is obviously a policy question of some importance and the Minister has indicated that the matter will be re-examined in the Phase II amendments together with the subject of loss-leadering—another area where possible lower prices to the consumer in the short run should possibly give way to other considerations. In this connection he said:

> "I do not want to duck the question at all; quite the contrary. It is an important area. It is public knowledge that in phase two we will be dealing with loss leading. I have indicated this in speaking to the other place that this would be one of the sujbects of study and action in phase two. We will also be dealing with price discrimination in phase two. We will come back to the subject at that time."[2]

3. *Sports.*

Because the Bill would extend the application of the Act to services, it could be argued that the customary arrangements between leagues and teams in amateur and professional sports with respect to players could be considered an offence under section 32 of the Act. Recognizing that some exemption should be granted, the Bill would substitute for section 32 a new section 32.3 which in essence repeats in subsection (1) in language more applicable to the sports world the offence contained in section 32 but also provides in subsection (2) a defence which could be invoked based on the desirability of maintaining a balance among the teams and the necessity of observing certain regulations in sports organized on an international basis.

Your Committee recommended that both amateur and professional sports should simply be exempted from the Bill.

While recognizing that combines legislation may not be the appropriate place for dealing with the problems of the sports world, the Minister, when he appeared before your Committee, suggested that in due course these and other matters affecting sports would be dealt with in a comprehensive way in other legislation and that in meantime this new provision should be inserted in the Combines Act. Your Committee, with some reservations, agrees, that the new provisions should be allowed to remain on the basis that some form of exemption from section 32 of the Act is required and that the matter will be kept under review by the Government for more appropriate attention at a later date.

4. *Regulated Trades, Industries and Professions.*

An area which has presented great difficulty to your Committee is the position of regulated industries, trades and professions. Because the Bill would bring services under the purview of the Act, attention has been focused on the problem although it may well be that the problem eixsted under the present Act in relation to trades and industries dealing with "articles".

[1] See Interim Report, Committee Proceedings No. 22, Item 8, p. 9.

[2] Committee Proceedings, Issue No. 61, November 19, 1975, p. 17.

Your Committee feels strongly that no industry, trade or profession, the bulk of whose activities are regulated by some governmental body, whether provincial or federal, should, in addition, be exposed to prosecution under the *Combines Investigation Act*.

Your Committee heard submissions in this area from the Institute of Chartered Accountants, the International Air Transport Association (IATA), the Air Transport Association of Canada, the Winnipeg Commodity Exchange and the Association of Canadian Franchisors and Independent Grocers' Alliance.

In the case of the Institute of Chartered Accountants (and other professions) and the Winnipeg Commodity Exchange, members have for years had arrangements with respect to certain aspects of the carrying on of their activities. There is nothing secret or covert about these arrangements and they have generally been regarded as being in the public interest. While some aspects of their activities may be considered to be regulated to one degree or another, some aspects clearly are not. Yet, if those activities are still regarded to be in the public interest, it would be an ill-considered policy that would abruptly, in the wake of a new law of general application, make them illegal merely because they are unregulated or insufficiently regulated.

An amendment was inserted in the Bill by the House of Commons which may be of some assistance to the professions. (See new subsection 32(7), clause 14, p. 26). It provides that a court shall not convict under the conspiracy section if it finds that the arrangement relates to the standards of competence and integrity reasonably necessary for the protection of the public.

The Minister and his officials in their testimony before your Committee stated on the one hand that they considered that the decisions of the courts, particularly in the *Breweries* case[1] and the *Farm Products Marketing* case[2], were sufficient protection for these groups. On the other hand, the Minister and his officials were unable to resist keeping the door to application of the *Combines Investigation Act* open by stating that they also felt that the degree to which a regulated trade, industry or profession could consider itself protected by this jurisprudence depended to a great extent on the manner in which the particular regulatory body responsible for them exercised its powers. Since in many cases it may not be up to or within the power of the particular industry, trade or profession to affect the manner in which such bodies exercise their legislative powers, your Committee considers that they may well be placed in an untenable position if the *Combines Investigation Act* is applied blindly to them.

The case of the air transport industry in Canada in particularly striking in this regard. Because of the nature of its activities, there has always been a high degree of cooperations amongst the various companies in the industry. This cooperation has been, in some cases, required and in other cases simply encouraged by the Government. For example, the Government of Canada has many agreements with other countries respecting air transportation which provide as follows:

"The tariffs referred to in paragraph (1) of this Article shall, if possible, be agreed in respect of each route between the designated airlines of the contracting parties, in consultation with other airlines operating over the whole or part of that route, and such agreement shall, where possible, be reached through the rate-fixing machinery of the International Air Transport Association. The tariffs so agreed shall be subject to the approval of the aeronautical authorities of both contracting parties."

It is true that the tariffs which result from such agreements must be filed with the Canadian Transport Commission but the question remains as to whether this process is a sufficient "regulation" to bring the carriers within the exempting formula contained in the judgment of Chief Justice McRuer in the *Breweries* case. Moreover, there may be other aspects of the air transport industry on which it has been the practice to have agreements and arrangements, with the encouragement of the Department of Transport and the Canadian Transport Commission, in respect of which the powers of supervision of the Canadian Transport Commission are not as precise as they are in the case of tariffs.

In its Second Interim Report, your Committee recommended that a provision be inserted in the *Combines Investigation Act* specifically exempting the air industry from the application thereof. The Minister has argued against the insertion of a specific exemption for particular named industries (although there are already some in the Act) but at the same time appeared to recognize the dilemma in which the industry might find itself as a result of application of the Act. The following are some excerpts from the Minister's testimony before the Committee on November 19th:

"... Phase II of the revision of the competition policy will be concerned especially with those matters which affect the structural issues of industry raised by merger, monopoly and specialization agreements. I could undertake today before you to say that this question of uncertainty which exists for the transportation industry must and could be clarified in the course of the coming months after full discussion with my colleague, the Minister of Transport, and the appropriate decision made as to whether it would be dealt with through the Canadian Transport Commission or the *Combines Investigation Act* ..."[3]

"... Secondly, I am quite prepared to meet some of the fears expressed by members of this Committee by saying that the new area now covered, that in order to clarify the situation we will undertake to have an in-depth study and come up with a positive conclusion one way or the other on Phase II. But basically we assume that competition is expected in the air transport industry and that the industry should conduct itself accordingly.

I hope and believe that everyone here accepts this understanding. Whether it is monitored by the Director of Combines (sic) and Research or whether by the CTC is a question that has to be clarified. I am quite prepared to ensure that it will be clarified in the course of the coming months.

Therefore, by the time we introduce Phase II of the competition policy we will know exactly whether it

[1] 1960 O.R. 601

[2] 1957 S.C.R. 198

[3] Committee Proceedings Issue No. 61, p. 6.

should be regulated through the CTC or under the umbrella of the *Combines Investigation Act*."[1]

"We ask that the aeronautical authority, being the CTC, exercise its full authority over civilians. We do believe that for the time being there is no danger of a case developing until we have had an opportunity of correcting the situation in Phase II, at which time we will put forward a definite position on this."[2]

" . . . The promulgation of a certain part of the Act will come within a matter of weeks. More particularly, in the service section, we have said that we will give sufficient time to the service industry to prepare themselves because of the new legislation. This will be a period of three, four or possibly five months. We might not promulgate this section until we have been able to settle clearly the question whether or not the CTC is doing this monitoring and this in-depth decision making. If the mechanism is in place within the CTC to do the in-depth evaluation, it is quite clear the *Combines Investigation Act* does not apply. We could then promulgate it without difficulty."[3]

Exemption from combines legislation for specific industries is not completely unknown in Canada. It was found some years ago, for example, by the Restrictive Trade Practices Commission that the shipping companies in Canada were operating a cartel in respect of an aspect of their business. It was also found by the Commission, however, that the cartel was in the public interest. The result was the *Shipping Conferences Exemption Act*.[4]

It is clear from the discussion in Committee that a great deal of further consideration will have to be given to the entire question of regulated trades, industries and professions in relation to competition legislation. Your Committee appreciates the difficulty of framing a general exemption covering all regulated activities, as was attempted in clause 92 of Bill C-256, because of the danger that general language may go further than desired in some cases and not far enough in others. On the other hand, your Committee favours a solution whereby the particular regulatory body concerned is responsible for all matters with respect to the industry under its jurisdiction to the exclusion of the *Combines Investigation Act*.

In this connection, the Minister has undertaken that, in availing itself of the split proclamation provisions in clause 31 of the Bill, the Government will not proclaim the Bill in relation to services for purposes of section 32 of the Act for a period of six months after proclamation of the other provisions of the Bill. A copy of the Minister's letter to the Chairman of your Committee is annexed to this Report.

The interval between passage of the Bill and proclamation, if carried out in accordance with the Minister's undertaking will provide time for a rational analysis of the problems, and, if necessary, for introduction of amendments to other legislation. If the matter cannot be resolved in that way, the introduction of the Phase II amendments to the Act will provide further opportunity for dealing with the problem.

This report has dealt largely with the position of the air transport industry and carriers. However, the discussion is applicable to other regulated and semi-regulated industries. In the latter category, falls the Winnipeg Commodity Exchange which also appeared before your Committee. The Exchange is an unincorporated association and therefore derives no legislative sanction for its activities from its own constitution. There is power under the *Grain Futures Act*[5] for the Board of Grain Commissioners of Canada to revoke or vary any by-law or rule of the Exchange which in its opinion is prejudicial to the public interest. The position of the Exchange appeared to be that this power of the Board over their operations was sufficient to bring their arrangements with respect to minimum commissions within the protective formula enunciated by Chief Justice McRuer in the *Breweries* case. The Exchange may or may not be well founded in taking that position in view of statements made by the Minister and his officials before this Committee. Their point, however, was that two of the commodities for which the Exchange prescribes minimum commission rates, namely rapeseed and gold, are presently not covered by the *Grain Futures Act*. The delay in proclaiming application of section 32 of the Act to service industries will provide time for the Exchange to seek an amendment to that Act so as to bring rapeseed and gold within the regulatory umbrella of the Board of Grain Commissioners. So as to clarify that these activities remain immune from the *Combines Investigation Act*, the Exchange may also wish to consider in the interval whether the powers of the Board under the Act should be strengthened or whether a specific exemption from combines legislation should be provided in the *Grain Futures Act*. The question in their case (as in all cases) should be examined on the merits: Are minimum commissions in commodity futures trading desirable in the public interest? If the answer is in the affirmative, which it apparently has been since the beginning of the Exchange's operations nearly a hundred years ago, then there seems little doubt that the supervision should come from the Board of Grain Commissioners rather than the Director of Investigation and Research under the Combines Act. The latter really cannot supervise or regulate. His is a blunt weapon; the sole question is: To prosecute, or not to prosecute.

The position of the Winnipeg Commodity Exchange has been dealt with in some detail because there may well be an analogy with other groups who may wish to take advantage of the deferred proclamation to analyse their position and make necessary changes in their own activities, or make representations for change in the legislation governing them or, possibly, in the *Combines Investigation Act* itself.

5. *Franchises*

Many arguments were addressed to your Committee to the effect that bona fide franchise arrangements should be exempted from the application of the Act. Because the Bill would make tied selling, exclusive dealing and market restriction practices reviewable under the new reviewable practices jurisdiction of the Commission and since one or more of these practices is usually involved in so-called

[1] Ibid, p. 7

[2] Ibid, p. 9

[3] Ibid, p. 10

[4] R.S.C. 1970, Chap. 39 (1st Supp.)

[5] R.S.C. 1970, Chap. G-17.

franchise arrangements, it is clear that the Commission will have the power to make orders with respect to franchise agreements. Your Committee believes that the basic elements which must be established by the Director before the Commission can make an order under these provisions, namely, that the effect of the arrangements is likely to lessen competition *substantially*, afford a certain degree of protection to those in the franchise business.

Beyond that, two amendments were made in the House of Commons which go toward meeting the concerns of your Committee. One was the addition of new subsection 31.4(7) clause 12, p. 19. This amendment is particularly designed to exempt one of the kinds of arrangement commonly used in the soft drink bottling industry. The other amendment is the addition of new paragraph 31.4(5)(c), clause 12, pp. 18 and 19 reading as follows:

> "(c) a company, partnership or sole proprietorship is affiliated with another company, partnership or sole proprietorship in respect of any agreement between them whereby one party grants to the other party the right to use a trade mark or trade name to identify the business of the grantee, provided
>
> (i) such business is related to the sale or distribution, pursuant to a marketing plan or system prescribed substantially by the grantor, of a multiplicity of products obtained from competing sources of supply and a multiplicity of suppliers, and
>
> (ii) no one product dominates such business."

This particular amendment developed in the House of Commons as a compromise to an amendment introduced by an Opposition member which would have completely exempted franchise arrangements. The Minister indicated that the Government would not be prepared to go that far and he then offered the provision referred to above which is now in the Bill. The purpose of the amendment wast to exempt arrangements such as those of the IGA Food Stores.[1] However, the Association of Canadian Franchisors requested a hearing before your Committee on the basis that the amendment, because of certain defects in the drafting, would not accomplish its purpose. The Association pointed out that IGA retail outlets purchase all of their supplies from IGA. Such supplies include some IGA brand names but also a wide range of other brands which are purchased by IGA from the suppliers of the other brands and then resold to the individual IGA franchisees. The argument was made that the use of the word "obtained" in line 39 on p. 18 without further qualification implies that, to come within the exemption, the products must be obtained from competing sources by the individual IGA franchisees. It was suggested that the words "by the grantor or the grantee" be inserted after the word "obtained" for clarification.

Inasmuch as the amendment was designed to exclude franchise arrangements similar to that of IGA, the submission of the Association of Canadian Franchisors cannot be dismissed lightly. It may be that the Commission will interpret the amendment in a manner favorable to this kind of franchise arrangement. At this stage your Committee is not inclined to recommend that passage of the Bill be delayed so that an amendment can be inserted. However, it does recommend to the Government that the submission of the Association be kept under consideration with a view to making a clarifying amendment, if necessary, at the time the Phase II amendments to the Act are introduced.

[1] See Commons Debates, October 16, 1975, p. 8278.

6. *Delay for Institution of Proceedings on Summary Conviction.*

The Bill, following amendment in the Commons, has extended the Criminal Code six months limitation period for institution of summary conviction proceedings to two years. Your Committee had recommended that the limitation period be removed all together so that the Crown would always be governed by the gravity of the offence rather than time limitations in electing as to whether to proceed by indictment or summary conviction. It may be desirable to retain a limitation on offences tryable only by summary conviction but your Committee continues to believe that the limitation should be removed for offences tryable either by summary conviction or indictment.

There remains to deal with certain recommendations in the Interim Report which have not been reflected in any way in amendments made to the Bill prior to passage by the House of Commons. No one of these alone is of sufficient importance, in your Committee's opinion, to warrant the delay in passage of the Bill which would result if an amendment were made by the Senate. Moreover, the mere fact that they have been highlighted and openly discussed with those who made submissions to your Committee as well as with the Minister and his officials, will in itself serve a useful purpose. Those who submitted briefs may to some extent have had their fears allayed and those responsible for administration of the Act will have gained some insight into the problems created by the apparent over-reaching in certain provisions of the Bill. Phase II will undoubtedly raise many of the same issues as the present Bill and it will be possible to develop the precise nature of any required amendments more intelligently in the context of the provisions of both Phase I and Phase II taken together. The items in question are as follows:

1. Your Committee outlined three areas in particular in which it expressed doubts as to the constitutionality of provisions of Bill C-2. Your Committee notes that an Opposition amendment in the Commons making proclamation of certain clauses of the Bill conditional upon a favourable constitutional ruling by the Supreme Court of Canada on reference thereto by the Governor General in Council was ruled out of order by the Speaker of the House of Commons. Without commenting on that ruling, it is obvious that an amendment along similar lines proposed by the Senate would create substantial difficulties. An individual litigant retains the right to test the constitutionality of any provision he desires in the courts and it may be that a court would be able to render a more meaningful decision on a constitutional issue raised in that manner.

2. On the question of the creation of the right of civil damages, your Committee expressed the view that making a conviction a prerequisite would strengthen the constitutional basis for the right. Your Committee was also concerned by the provision allowing the complete record of proceedings in a criminal case to be used in the civil proceedings. Your Committee continues to have doubts as to the justice and workability of this feature which is contained in new subsection 31.1(2), clause 12, p. 12. This is a procedural matter and your Committee will be satisfied if the matter is kept under surveillance to see whether its doubts prove to be well founded.

3. While in agreement with the provision permitting the Crown to seek an interim injunction, even without notice to the other party, to restrain conduct directed toward the commission of an offense under the Act, your Committee's concern was that where such an injunction turned out, on the merits, to be unwarranted, the Crown (as would an ordinary litigant in similar circumstances) should be liable for any damage caused to the party against whom the injunction was obtained. It may be that such liability exists without amendment to the Bill, or that a court would have discretion to impose such liability by making issuance of the injunction conditional upon the Crown executing an undertaking to be liable. Jurisprudence on the subject is not clear where the Crown is the applicant for the injunction and your Committee continues to think that legislative clarification is desirable. However, it may be that the importance of interim injunctions will be even greater with respect to the Phase II amendments to the Act and your Committee therefore agrees that consideration of any amendment may be deferred until that time.

4. Your Committee was concerned that, in the refusal to deal provisions, the Commission will be able to make an order if there is merely "insufficient competition amongst suppliers of the product", (paragraph 31.2 (1)(b), clause 12, p. 14). Much will depend on the manner in which the Commission interprets the jurisdiction given to it and your Committee is satisfied that this is another area in which any amendment could be developed better in the light of Phase II.

5. Your Committee expressed concern in the Interim Report and this concern was shared by many of those who had occasion to comment on the Bill including members of the Commons Committee on Finance, Trade and Economic Affairs, that the inability to obtain supplies of a particular brand name product might give rise to an order being made by the Commission against the supplier of that product notwithstanding that identical or functionally similar products produced by other suppliers were available. Your Committee's recommendation that an amendment be made clarifying that the word "product" was used in its generic sense was partially accepted in amendments made in the Commons by the insertion of new subsection 31.2(2), clause 12, p. 14. However, that amendment does provide that where a single brand name product is very dominant, its supplier may be made the subject of an order notwithstanding that similar products are available to the complainant. Your Committee fears that as a result of this provision, an already dominant product could become a virtual monopoly, a condition which is obviously contrary to the objectives of the legislation. It is to be hoped that the Commission will be cognizant of this possibility in its approach to applications under the section.

6. Again in the refusal to deal provisions, your Committee was concerned (new paragraph 31.2(1)(a) that a person not yet in business at all would be permitted to invoke the refusal to deal provisions in order to force his way into business. Your Committee had and continues to have doubts as to the need for the entire refusal to deal section. However, it appears to be considered important by the Government as a matter of policy and unless the provision is to be deleted in its entirety, it may be preferable to leave it intact. It is to be hoped that the Commission will extend the benefits of the provision to a person not yet in business only with extreme caution.

7. Finally, your Committee expressed doubts as to the sufficiency of the right of appeal from orders of the Commission under section 28 of the *Federal Court Act*. Questions arising under the Commission's reviewable practices jurisdiction are not as likely to produce such purely legal issues as that which arose recently under subsection 10(5) of the Act.[1] In that case a Judge of the Supreme Court of Ontario held, as *persona designata* under the section, that the solicitor client privilege extends, in principle, to the seizure of documents, in the course of an investigation, in the possession of a salaried lawyer employed by the company under investigation. On appeal by the Director under section 28 of the *Federal Court Act*, the Federal Court of Appeal affirmed the decision of the Ontario Judge.

Your Committee has by no means abandoned its recommendation for a wider recourse but nevertheless recognizes the difficulties in giving to an appellate court powers to interfere with questions of fact. It appears that the Commission may receive still further powers pursuant to amendments to be introduced in Phase II at which time the nature of the right of appeal from orders of the Commission will be an even more important topic of consideration.

There is a final matter, not arising out of either of its Reports on the advance study, upon which your Committee considers it should comment. During the debate on the report stage of the Bill in the House of Commons, certain amendments increasing the severity of the punishment which may be inflicted by the courts for violation of the offences under the Act were proposed by the Government. Certain sub amendments to these amendments were proposed by a member of the Opposition and the Government amendments, as amended by the Opposition member's motion, were adopted by the House. The result is that the punishment provisions of the Act are expressed in an inconsistent manner and it may be that a court would conclude that the intention was to override certain provisions of the Criminal Code which would normally give the court flexibility. These matters were brought to the attention of the Minister when he appeared before your Committee and were discussed with him at some length. The Minister recognized the dangers and he has undertaken to introduce amendments to the end that all punishment provisions of the Act are prescribed in a uniform manner.

Respectfully submitted,

Salter A. Hayden,
Chairman.

[1] In re Shell Canada Ltd., 1975, F.C. 184.

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FIRST SESSION—THIRTIETH PARLIAMENT
1974-75

THE SENATE OF CANADA

PROCEEDINGS OF THE

STANDING SENATE COMMITTEE ON

BANKING, TRADE AND COMMERCE

The Honourable SALTER A. HAYDEN, *Chairman*

Issue No. 71

TUESDAY, DECEMBER 9, 1975

Complete Proceedings on Bill C-73, intituled:

"An Act to provide for the restraint of profit margins, prices, dividends and compensation in Canada"

REPORT OF THE COMMITTEE

(Witnesses: See Minutes of Proceedings)

29898—1

THE STANDING SENATE COMMITTEE ON BANKING, TRADE AND COMMERCE

The Honourable Salter A. Hayden, *Chairman*

The Honourable Senators:

Barrow	Hayden
Beaubien	Hays
Buckwold	Laird
Connolly (*Ottawa West*)	Lang
Cook	Macnaughton
Desruisseaux	McIlraith
Everett	Molson
*Flynn	*Perrault
Gélinas	Smith (*Colchester*)
Haig	Sullivan
	Walker—(19)

* *Ex officio* members

(Quorum 5)

Order of Reference

Extract from the Minutes of the Proceedings of the Senate, December 9, 1975:

"Pursuant to the Order of the Day, the Senate resumed the debate on the motion of the Honourable Senator Perrault, P.C., seconded by the Honourable Senator Langlois, for the second reading of the Bill C-73, intituled: "An Act to provide for the restraint of profit margins, prices, dividends and compensation in Canada".

The debate was interrupted, and—

The Honourable the Speaker having put the question whether the Senate do now adjourn during pleasure to reassemble at the call of the bell at approximately two o'clock p.m., it was—

Resolved in the affirmative. 1.00 p.m.

The sitting of the Senate was resumed. 2.15 p.m.

After further debate, and—
The question being put on the motion, it was—
Resolved in the affirmative.

The Bill was then read the second time.

The Honourable Senator Perrault, P.C., moved, seconded by the Honourable Senator Langlois, that the Bill be referred to the Standing Senate Committee on Banking, Trade and Commerce.

The question being put on the motion, it was—
Resolved in the affirmative."

Robert Fortier,
Clerk of the Senate.

29898-2

Minutes of Proceedings

Tuesday, December 9, 1975
(93)

Pursuant to adjournment and notice the Standing Senate Committee on Banking, Trade and Commerce met this day at 2:45 p.m.

SUBJECT: Bill C-73—"An Act to provide for the restraint of profit margins, prices, dividends and compensation in Canada".

Present: The Honourable Senators Hayden (*Chairman*), Beaubien, Cook, Flynn, Haig, Lang, Macnaughton, McIlraith, Molson and Smith (*Colchester*). (10)

Present, not of the Committee: The Honourable Senators Asselin, Bell, Benidickson and Phillips. (4)

In Attendance: Messrs. C. Albert Poissant and W. E. Goodlet, Consultants to the Committee.

WITNESSES:

Department of Finance:

The Honourable Donald S. Macdonald, P.C., Minister;

and

Mr. M. E. Cohen, Assistant Deputy Minister, Tax Policy.

The Committee then proceeded to the examination of the said Bill following a short statement by Mr. Macdonald; assisted in such examination by Mr. Macdonald and Mr. Cohen.

Following discussion, it was moved by the Honourable Senator Macnaughton that the said Bill be reported, without amendment.

In amendment, the Honourable Senator Flynn moved that Clause 35 of the said Bill be deleted.

The question being put,

The Committee divided as follows: YEAS: 3; NAYS: 4.

The motion was declared *lost.*

The Honourable Senator Flynn further moved in amendment, that Clause 46(2) be amended as follows: "Strike out 'December 31, 1978' in lines 6 and 12 thereof, and substitute therefor 'March 31, 1977' ".

The question being put,

The Committee divided as follows: YEAS: 3; NAYS: 4.

The motion was declared *lost.*

In amendment, the Honourable Senator Molson moved that Clause 46(6) be amended by adding thereto, in the proper place, the words "a similar motion passed by the Senate".

The question being put,

The Committee divided as follows: YEAS: 4; NAYS: 4.

The motion was declared *lost.*

Upon motion of the Honourable Senator Lang, it was *Resolved* to incorporate, in the Report of the Committee, certain observations objecting strongly to the exclusion of the Senate in determining the termination date of the said Act.

The question being put on the main motion, it was *Resolved* to report the said Bill, without amendment.

At 5:00 p.m. the Committee adjourned until 9:30 a.m., December 10, 1975.

ATTEST:

Frank A. Jackson,
Clerk of the Committee.

Report of the Committee

Wednesday, December 10, 1975

The Standing Senate Committee on Banking, Trade and Commerce to which was referred Bill C-73, intituled: "An Act to provide for the restraint of profit margins, prices, dividends and compensation in Canada", has, in obedience to the order of reference of Tuesday, December 9, 1975, examined the said Bill and now reports the same without amendment, but with the following observations:

These observations are included in this Report on the express direction of the Committee and relate to subclause 6 of clause 46 of the Bill, which was added in the course of the third reading of the Bill in the House of Commons.

Clause 46(6) reads as follows:

"(6) Where, at any time after March 31, 1977 and before July 1, 1977, a motion for the consideration of the House of Commons, signed by not less than 50 members of the House, is filed with the Speaker to the effect that this Act shall expire on a date before December 31, 1978 that is specified in the motion, the House of Commons shall, within the first fifteen days next after the motion is filed that the House is sitting, in accordance with the Rules of the House, take up and consider the motion, and if the motion, with or without amendments, is approved by the House, this Act expires on the date that is specified in the motion."

These observations are made for the purpose of expressing the resentment of the Committee to the provision in the said subclause 6 by virtue of which, where a motion is signed by not less than 50 members of the House of Commons and is then filed with the Speaker of that House providing for the expiration of the Act, on a date before December 31, 1978, and is voted on and approved by the House of Commons, then such approval by the House of Commons shall terminate the life of the Act.

This presents an anomalous situation. Bill C-73 can only become law as, if and when approved not only by the House of Commons but by the Senate of Canada and thereafter receives Royal Assent. To propose, therefore, in such a Bill as C-73 the termination of the Act by unilateral action of the House of Commons is arbitrary and presumptuous. As a result, this Bill and this particular subclause 6 of clause 46 thereof was the subject-matter of a proposed amendment put forward in your Committee, adding the requirement of approval of any such proposed termination of the Act by the Senate of Canada. Such proposed amendment was defeated by the narrowest margin, namely a tie vote. Those voting against the proposed amendment were as strongly opposed to the form of the provision in the said subclause, requiring only the approval of a majority of the House of Commons for the subsequent expiration of the Act, as those who favored the said proposed amendment.

The need for bringing into law the provisions of this Bill as quickly as possible in the best interests of the economy of Canada was the impelling motive of those who voted against the proposed amendment. The Committee regards the conditions providing for the termination of the life of this Bill as a display of unjustified arrogance. Such a provision has appeared in several other Bills which at an earlier time have come before the Senate, but the Committee warns that any repetition of such a provision in any future legislation will lead to an amendment of the Bill whatever may otherwise be the degree of urgency and the beneficial purposes of the Bill.

Respectfully submitted,

Salter A. Hayden,
Chairman.

The Standing Senate Committee on Banking, Trade and Commerce

Evidence

Ottawa, Tuesday, December 9, 1975

The Standing Senate Committee on Banking, Trade and Commerce, to which was referred Bill C-73, to provide for the restraint of profit margins, prices, dividends and compensation in Canada, met this day at 3 p.m. to give consideration to the bill.

Senator Salter A. Hayden (*Chairman*) in the Chair.

The Chairman: We are dealing this afternoon with Bill C-73, and we have as our main witness the Minister of Finance. Also present is a gentleman who has appeared before us on many occasions, Mr. Cohen. We also have our experts, Mr. Poissant and Mr. Goodlet.

Mr. Minister, do you want to make an opening statement?

The Honourable Donald S. Macdonald, Minister of Finance: Mr. Chairman, I have a few opening remarks. As honourable senators are aware, there have been extensive statements made by me both in and outside the House of Commons, and by others as well, in relation to the program. I know that you have had an extensive debate yourself, and at this point there is really very little that I can add to what has already been said. I might say, however, that there are several additional pieces of information which have come to hand. I have just tabled in the House of Commons copies of draft agreements under clause 4(3) and (4) of the bill which will authorize the entering into a relationship between the federal and provincial governments concerning the application of the provisions of the law to the provincial public sector. I have one set of copies of these here, in both official languages, and I wonder if it would be possible to have some additional copies run off. I think it might be of some assistance to have these on your own record of proceedings. I should also like to defer questions on these points until I get the copies back.

One of the other elements that has been of interest and concern, and to which senators may have given special attention, has been with respect to certain other categories of industry that are not covered by the controlled part of the program. Naturally the restraint is directed to them, but they are not covered by the controlled part of the program.

Senators will recall that under clause 12(2):

> (2) The Board shall, on receipt of a direction from the Governor in Council and not otherwise, conduct such inquiry as it considers appropriate to enable it to advise the Governor in Council as to whether any particular private sector supplier of commodities or services specified in the direction or any class of such suppliers so specified to whom and to whose employees the guidelines do not apply . . .

And it goes on, should be added to the group of companies covered by the section. We have received a number of requests from various firms in the private sector that they might be considered under this clause, and I thought it might be useful to bring to the attention of honourable senators that as soon as the bill receives royal assent it would be the intention of the Governor in Council to consider the situation in the following industries: the trucking industry; the full construction industry—that is to say, we will be talking of firms with more or less than 20 employees; the shipping industry on the west coast of Canada, the Great Lakes and the St. Laurence River; the longshoring industry; and the grain-handling industry—the recommendation going to the Anti-Inflation Board with a request to the board to recommend whether, in what manner and to what extent any or all of those industries should be designated for the controlled part of the statute. Naturally it will be for the board to decide whether under all the circumstances it would make a recommendation back to the Cabinet, and then it would be for the Cabinet to decide.

But I thought it might be useful to indicate that, in addition to the categories of employment and firms that we are considering here, there will also be consideration with regard to those additional firms.

The Chairman: Was there a request from any source?

Hon. Mr. Macdonald: Yes, I would have to say there have been requests from many more than those specified there. That list of firms would indicate a judgement on the part of my advisers and myself as to those industries in which questions might legitimately be raised and on which we would like to seek the advice of the Anti-Inflation Board.

If I could draw to senators' attention as well, if there is a positive recommendation by the Anti-Inflation Board and if the Governor in Council decides to designate and designates any or all of those industries, then the designation would be as of today—that is to say, as of my announcement today—and the designation would be applicable to the firms both on the price side with regard to the goods and services that they provide as well as the compensation side, their ability to pay compensation to their employees.

Those, therefore, are two additional pieces of information which I thought might be of assistance to members of the committee in their deliberations.

The Chairman: Are there any questions on that?

Senator Molson: Would any of those who have a large number of employees have been originally designated?

Hon. Mr. Macdonald: There would have been some, and the real problem is that one is looking at a series of industries where there are big firms and small firms. The trucking industry would include Smith, which, as you

know, is an affiliate of the CPR, and it would have been included. But in some situations they would have been competing with smaller firms, and there is collective bargaining in most of Canada in the trucking business as a whole, and there was an unevenness in the application and some risk that there could be an adverse effect on the economy with a prolonged work stoppage as a result of difference of treatment between the two sizes of firms. That is all I have to say.

Senator Smith: I wonder if it would be in order to ask the minister whether a variety of reasons was given by these companies to be included.

Hon. Mr. Macdonald: I think it is fair to say that there were a variety of reasons. I think the common factor that ran through them all—and here the grain handling trade is a good example—was that they are of a sufficiently critical nature and importance to the economy of Canada that there was some concern on the part of the government that instability in collective bargaining or in labour relationships there could have undue ramifications for the rest of the country and for the grain marketing economy.

Senator Smith: But I understood you, Mr. Minister, to say that requests in a number of cases had emanated from the companies themselves. I was wondering if there had been a variety of reasons given by the companies themselves for making that request.

Hon. Mr. Macdonald: I would also have to say that some of them emanated from other departments of the federal government. I should perhaps leave it to your imagination as to what departments they would be. The reasons would have varied, although I think the common factor was the fear of instability in labour-management relationships.

The Chairman: Mr. Poissant?

Mr. C. A. Poissant, Consultant to the Committee: The first question to which all Canadians wish to know the answer is, when will the regulations be available?

Hon. Mr. MacDonald: I would anticipate that they would be available next week. I cannot be precise as to the date, whether they would be available by a week from tomorrow or not until the end of next week. However, we would anticipate that the regulations would be available len. I should not start off by apologizing for them, but I should really put it on the basis that we anticipate that when the regulations come out, just as has been the experience with the tax regulations over the years, there will be situations which have not been anticipated and we would anticipate that there would have to be amendments to them from time to time. We will therefore not be surprised if groups or individuals return and say that the regulations appear either to have missed a particular situation or to be inequitable, and we obviously will be attentive to such representations.

Mr. Poissant: Do you intend to issue the regulations in draft form, or will they be final when issued next week?

Hon. Mr. MacDonald: That really depends upon when we receive royal assent to the bill. If by the time the regulations are ready to be issued the bill has received royal assent. we would be able then to promulgate them as regulations in the formal, legal sense. If the bill has not received royal assent by that time, they will be largely in draft form.

Mr. Poissant: You understand, Mr. Chairman, that many of our questions are in connection with the regulations, so the questions would be reduced in number if we knew the content of the regulations.

The other question we have in mind is the definition of "compensation," which has been raised before in this committee. Reference is made to groups, and you will recall that the guidelines provide for a maximum of $2,400, but that is the group overage. What is the definition or what constitutes a group?

Hon. Mr. MacDonald: Again I would be speaking in more general terms than precise, legal form. For example, the kind of grouping which MacMillan Bloedel had in mind in its announcement of last night, or this morning, when it reduced management salaries by 2 per cent, would be one such grouping. It could also be the type of grouping which the Canadian Transport Commission had in mind when it reduced the executive category salaries of the British Columbia Telephone Company by $1.5 million. Obviously it would be difficult to be very precise about this, but it will certainly be, in general terms, a grouping which one could describe as being the executive category, consisting of officers and senior managers within a company.

Mr. Poissant: Is that a naturàl grouping mithin the company, or a grouping suggested by the company, or a grouping set by regulation?

Hon. Mr. MacDonald: Mr. Cohen reminds me that there would be an attempt made in the regulations to capture what in fact companies do in practice. However, I would have to recognize at this point that corporate situations may differ one from an other, and it could be difficult to be final in this regard. Very naturally, in looking at a situation the Anti-Inflation Board will have to look at the particular facts and it will have some reference in doing so, I am sure, to the historical treatment of groups of employees. This would take cognizance of, for instance certain employees being grouped together and treated in a similar manner with respect to compensation plans, although there may be a difference in scale.

Mr. Poissant: In other words, within the same enterprise there could be many groups?

Hon. Mr. Macdonald: There could be many groups. In a very large enterprise we could be looking at different functional groups in addition to the executive.

Mr. Poissant: Returning to the ceiling of $2,400 within the same group, it seems to be possible, as discussed during previous meetings of this committee, that the $2,400 could at some time be increased, depending on special circumstances. Will the regulations define, for instance, if the salary could be increased if it is based on merit? We have in mind, for instance, a promotion within the same firm, or from one group to another group, or within the same group. Would there be provision for an employee's salary to be raised in excess of the $2,400; and, secondly, that it could be in excess of the aggregate of the group?

Hon. Mr. Macdonald: Yes, if an individual has been occupying the position of secretary-treasurer and is promoted to president of a company, he could take that promotion and move to the compensation level at which the president was remunerated prior to that particular appointment.

Mr. Poissant: He could take the remuneration that was fixed previously for that function?

Hon. Mr. Macdonald: Yes, if he was at $35,000 as secretary-treasurer and moved up to the top job, which paid $50,000, he would be entitled to move up to that notwithstanding the $2,400 limitation. A true promotion, which would be the case in that example, would not be restrained.

Mr. Poissant: Within the same category of question, would the $2,400 limitation apply in a case in which an employee, without changing group or being promoted but just because of the historical pattern in the company, is advanced from year to year based on his experience, from an inexperienced employee to an experienced level, without changing the nature of his function?

Hon Mr. Macdonald: Yes, sir; that is a difficult situation. It brings in the question of so-called automatic increment, which is relevant in both private and public employment, an automatic increment being founded on the assumption that an employee becomes more productive year after year and, therefore, should expect to move up by regular steps as time goes on. We have sought to analyze this in two ways. We have really concluded that automatic increments should be included within the guideline limitations. In other words, within its automaticity there would be an upper ceiling of 8 per cent plus 2 per cent. On the other hand, it would be conceivable under some circumstances that merit increases could take place, but they would have to be justified in particular cases. A mere automatic moving up, however, would not be regarded as being exceptional and beyond the guidelines.

Senator Molson: Mr. Chairman, may I ask the minister if any method of up-grading by some device and miscalling it a promotion will be eliminated by the regulations?

Hon. Mr. Macdonald: Yes, senator.

Senator Molson: It would be caught and stopped, would it?

Hon. Mr. Macdonald: It would be caught and stopped. Indeed, if it occurred in an individual case that the individual, by some colourable means, was given a $3,000 per year increase with no observable facts on the basis of increased productivity, the Anti-Inflation Board could refer that case to the administrator, who could well make an order that the employee shall pay back the excess of $600 over whatever he had been entitled to receive. So either colourable changes in compensation, other kinds of compensation than straight dollars and cents, or phoney job designation changes would be the subject matter of restraint and roll-back.

Senator Haig: Just because he got his name on the door, it does not mean he is entitled to $3,000.

Hon. Mr. Macdonald: That is correct; it would have to be related to an actual change in responsibility, a genuine promotion. My example was from secretary-treasurer to president, in which case not only would he be receiving greater remuneration, but the prospects would be of having to work harder and having to make some of the major decisions.

Senator Haig: What will happen in the case of companies paying yearly increments of 10 per cent to their staff? Will that be allowed?

Hon. Mr. Macdonald: That would be caught by the restraint program. If it is not an automatic one for everybody, they go up by that amount, but 8 per cent plus 2 per cent productivity in the first year would be the maximum to which they would be entitled.

Senator Haig: Supposing officers have a union agreement or understanding that they each get 5 per cent or 8 per cent increase over the year, would that be allowed?

Hon. Mr. Macdonald: That is within the guidelines, and therefore has to be counted towards the total of 10 per cent.

Senator Molson: What about a bonus system?

Hon. Mr. Macdonald: That will depend very much on the historic nature of the remuneration. With some firms there has been an observed practice over the course of time of paying a certain percentage on salary throughout the year, and then, perhaps, a bonus of up to one-third at the end of each year. It would obviously be unfair in the year 1975, because the curtain rang down on October 14, to cut off the bonus. If ther is a practice of regarding the person's remuneration as being a composite of the basic income plus bonus, then the two would be aggregated in determining the income base. In that, of course, you would want to take a hard look at the bonus. If the bonus was spectacularly beyond what the previous practice had been with regard to bonuses, there might be some evidence for the "Anti-Inflation Board to say, "This looks to us like one means of evading the guidelines."

Senator Molson: One of the difficulties would be that while bonuses tend to become fixed, as we all know, and become taken for granted—and, in fact, become part of standard remuneration—every now and again they are really bonuses, and you get a good year and a bad year comparison. In that case the guidelines might actually work a hardship on people who come under that system. I suppose that is just bad luck.

Hon. Mr. Macdonald: They could indeed. I think that falls into the category of "rough justice"—or "rough injustice."

Senator Beaubien: Mr. Minister, would you average it out over three years, or something like that?

Hon. Mr. Macdonald: We would have to look for a pattern. If we found that this had been happening, that, for example, the bonus at the year end was as much as one-third in each of the several previous years, that kind of historic experience would apply in this particular case. It would be rather more difficult to allow a situation where a firm suddenly said, "We decided on October 12 to move from a fixed income per month to a bonus system." I think you would want to be from Missouri on that one.

Mr. Poissant: In connection with the question asked by Senator Molson, what about contracts that provide a fixed salary plus a percentage rate of participation in the profits at the end of the year, based on a written contract?

Hon. Mr. Macdonald: Basically it would be an existing contract. So long as the percentage rate of participation was not changed, it was a 5 per cent increase, that would continue to apply to whatever the 5 per cent was applied against.

Mr. Poissant: That rate would remain constant.

Hon. Mr. Macdonald: That is right.

The Chairman: You mean the percentage would not change?

Hon. Mr. Macdonald: The percentage would not change. The take-home or take-in-hand, could in some circumstances be larger.

Mr. Poissant: Does the regulation require that it be a written contract to be applicable, or would the past history suffice?

Hon. Mr. Macdonald: The past history of employment would be adequate.

Mr. Poissant: Those are all the questions I have regarding "compensation."

My second group of questions is in regard to prices. I am talking about selling prices. According to the recommended formula, there would be two ways of looking at it: either you fix your price—and I gather this would be the rule—on the cost pass-through method; or, alternatively, it would be on the 95 per cent net pre-tax margin. How about prices that were announced prior to the tabling of Bill C-73?

Hon. Mr. Macdonald: Basically the prices already announced would be a fait accompli so far as the bill is concerned. I do not know if we have had any situations to the contrary. The basic principle would be that if someone had announced a price prior to October 14, that is the starting price for the purpose of the program.

Mr. Poissant: Let us say that a manufacturer had decided to issue a new price list as of July 31 to take effect on November 15, which is after October 14, and it could be a raise which could be greater than what the cost pass-through method would allow, which price would prevail?

Hon. Mr. Macdonald: Basically an announced price like that, particularly if the price list has gone out, would prevail.

The Chairman: That is the kind of situation you would have in catalogues.

Hon. Mr. Macdonald: Very much so. I suppose there are quite a few price lists which have gone out, and the firm and its customers having dealt on a certain basis, the assumption generally would be that that price should go through.

Mr. Poissant: On the subject of prices, that brings me back to another type of price—namely, fees which professionals would be entitled to charge. Would the regulations fix professional fees within the spirit of the law?

Hon. Mr. Macdonald: This has been a very difficult area, because you not only have differences from profession to profession but you also have differences from province to province. Indeed, even within a province you have differences of treatment and of circumstances.

Looking at the legal profession, for example, you have partners and associates of the very large firms; you have a man engaged in a practice by himself; you have three or four partners together. Basically what we have sought to do is to work out—and the legal profession may be the easiest in this regard—with the provinces and with the representatives of the law societies a standard billing practice; in the first place, to agree on what is a standard billing practice for the purpose of regulations, and then to say, "All right, this is the practice to be followed by practitioners in this regard, and to be within the guidelines basically no one should depart from that billing practice."

That only gets you part way over the difficulty of scrutinizing professional incomes, because, of course, someone by dint of extra hours or by plain good luck may have the occasion to earn more in a particular year than he did the past year. We are recognizing, with regard to the professions, as we do with regard to working men who can either put in overtime or can moonlight, work on a second job, that if someone wants to put in more hours on a particular job he should be entitled to have the additional income above and beyond the basic income per annum.

We would propose therefore to try to have a set formula for billing practices with regard to professional practitioners, and we have put the suggestion to the provinces that having provided the standard form we would require certain practitioners above a certain level to file a professional income tax statement at the time that their general income tax statement is filed—a professional income statement for the purpose of the Anti-Inflation Board, which the board could really examine on a selective basis; and where, for example, it finds that there has been what appears to be a rather spectacular increment, they can then go to that practitioner and say, "You seem to have had a rather good year. Tell us about your good fortune and how it came about?"

On this basis, if it appeared that there had not been extra hours worked and that there had been an element of overcharging, it would be a matter of referring it to the administrator, who might have to make an order indicating that a particular practitioner should be entitled to a return to cover any increase in his overhead and an income up to $2,400 per year but nothing more.

Senator Flynn: Simple.

Hon. Mr. Macdonald: It is simple to describe; it is not simple to carry out.

Senator Flynn: I am wondering if the minister is suggesting that he is leaving to the provinces the responsibility of being the first control.

Hon. Mr. Macdonald: To a degree, that is right. In this respect, we are dealing in many cases with self-governing professions which are the creations of the provincial governments. All of the provincial law societies, for example, are creatures of provincial legislation. The provinces have accepted their interest and participation in establishing a basic standard of billing. From that point, we take the responsibility of making sure, to the greatest degree we can, that professional incomes are supervised to make certain that an individual, in his or her practice, is not exceeding the guidelines.

Senator Flynn: It should be easy to accomplish that in respect of the medical profession, in any event, because the fees are determined, in practically all cases, under the respective medicare programs of the provinces.

Hon. Mr. Macdonald: It is easy and difficult with regard to doctors. It is true that there have been certain standards applied under the basis of the respective provincial medicare programs. One of the further complications in respect of the medical profession, however, is the extent to which a doctor, following the standard billing practices, could increase the rate of calls or the frequency with

which his patients are seen, thereby increasing his income. The government has said that if someone is prepared to work harder, they should be entitled to receive the benefit. However, at what point does putting the patients through too fast become bad medicine? This is something that concerns both the provincial governments and the federal government.

Senator Flynn: Do you think the administrator would intervene in such a situation?

Hon. Mr. Macdonald: We feel that the provinces also have an interest in this. Assuming the individual involved is a participating doctor in the provincial medicare program, it is the province that will be in a position to make certain that while he continues to provide a very comprehensive service to his patients, he does not expand the number of patients to whom he provides comprehensive service too broadly.

Senator Flynn: But in fact the first level of control in the case of the legal and medical professions would be that which is exercised by the provinces.

Hon. Mr. Macdonald: Yes. Of course, the real advantage is that a participating doctor in a provincial medicare program files his accounts with the respective provincial authority, and that authority could get an early reading of the fact that the man has suddenly shown a new enthusiasm for practising medicine, which may warrant an explanation.

Senator Flynn: Architects, engineers, and others who work on a percentage basis, will not really be affected by this legislation, will they?

Hon. Mr. Macdonald: There is a problem that arises in this respect. Indeed, the problem extends to lawyers practising in the field of real estate. If the government merely standardizes the billing practices and sits back, the increase in the value of land would continue to bring about an increase in incomes. There have been some discussions with the provinces and the professional groups with the objective of perhaps relating fees to the fact that there may be an element of inflationary growth that, at the upper end of the scale, might be scaled down.

Senator Flynn: I realize your difficulties.

Senator Smith: Mr. Chairman, in respect of professional groups, there is another problem which I am sure the minister has heard a good deal about. I am not sure that any conclusions have been reached as to how this group should be dealt with. I am referring to the relatively young people who are just entering the professions. These people, normally, are paid on a very modest basis, perhaps because they are not fully qualified. Then they become qualified, at which point their salaries should be increased, perhaps very substantially, and as they gain experience in their first three or four years of practice one would expect their salaries to increase even more substantially. I am wondering if any formula has been worked out in an effort to administer even rough justice in the case of that group.

Hon. Mr. Macdonald: That question has been raised. I personally have a very sharp recollection of those days.

We have attempted to deal with that problem in our discussions with the law societies of the provinces. It is true that a lawyer in his first year out has a certain value to a law firm, but with two years' practice under his belt he is obviously a more productive person from the standpoint of the firm. We have attempted to deal with that situation. The same would apply to the medical profession. If someone has been a resident intern, for example, and then opens up a consulting practice, obviously we cannot continue to judge that individual by the salary he was receiving as a resident intern.

Senator Smith: I wonder if it is premature to ask whether some method of dealing with this problem has been tentatively worked out with the provinces.

Senator Flynn: If he is not satisfied, he could go into politics!

Senator Molson: The sky's the limit!

Hon. Mr. Macdonald: I think the basic principle has been worked out in that the situations to which you have referred will be treated somewhat similar to a promotion. We will try to take that into account in the regulations.

The Chairman: It would appear, Mr. Minister, that all these things, basically, involve relating productivity to compensation. In other words, if after three or four years a lawyer is producing a higher volume of income for the firm, he would then be entitled to a raise in salary as a result of increased productivity.

Hon. Mr. Macdonald: That certainly would be an important factor.

Senator Flynn: He would only be allowed 2 per cent for increased productivity.

Hon. Mr. Macdonald: That is on a national basis.

Senator Haig: Mr. Chairman, may I suggest that the minister and his officials read Judge Philps' case of a week ago in which a solicitor presented a bill in an estate matter and the executors asked that the bill be taxed. The judge reduced the bill by $12,000. The tariff was $3,000. He allowed an extra $3,000 because of the complications involved in the estate and threw the rest out. That lawyer was over the guidelines, way over the tariff of the law society, and the matter has been referred to the law society of the province involved.

Senator Molson: Mr. Chairman, I want to say, first of all, that I am getting away from the legal profession.

Hon. Mr. Macdonald: That is a refreshing departure.

Senator Molson: The minister referred to moonlighting. There is a very large body of our citizenry who have two regular sources of income, one being their regular job and the other their "moonlit" job. I am wondering if there is any prospect, through this legislation, of limiting the proportion between those two sources so that the moonlight job—and probably it is an unreported moonlight job—does not become the main factor in the income of the individual and the more public function, or seen function, disappear from sight.

Hon. Mr. Macdonald: I think it is fairly hard to control that, Senator Molson, particularly where the second job may be a service job in which the manner of remuneration or the form of relationship may be such that there are hardly any written records created. This is a problem, of course, in which the Minister of National Revenue has a continuing interest. I am not sure that it is going to be possible to control it. I suppose one could argue in the broader sense, in terms of national productivity, that if the

man or woman is putting in additional hours, if he or she is prepared to put in hours beyond eight hours a day for the purpose of earning additional income, that is a personal choice which may add to the national productivity rate.

Senator Molson: It would be a happier situation if they were making a contribution to the coffers of the nation at the same time.

Hon. Mr. Macdonald: And the nation agrees with you on that.

Senator Molson: It just does not know how to get at it.

Hon. Mr. Macdonald: It may be merely accepting the inevitable.

Senator Lang: Mr. Chairman, I wonder if I could ask the minister, in connection with professions and on the compensation side, whether any consideration has been given with respect to professionals who carry on their professions in corporate form, and how those individuals are to be characterized.

Hon. Mr. Macdonald: They are dealt with as professionals rather than as a corporation, and therefore they would be subject to the same restrictions.

Mr. Poissant: I think the law refers to them as "suppliers of services."

Hon. Mr. Macdonald: "Suppliers of services"; that is right.

Senator Lang: I do not suppose any distinction would be made between employees of that professional corporation who are shareholders and employees of that professional corporation who are in fact the owners of the firm.

Hon. Mr. Macdonald: There is a distinction there. The owner-employee, the person with an equity interest, is treated differently from the employed employee, in the sense that if the benefits accruing to the corporation are, in effect, benefits that accrue pro rata to the owner-employee, they will be treated accordingly. I was about to say he could increase his dividend, but of course we have got him on that.

Senator Flynn: Do you think you will have enough in three years to arrive at a formula in these fields?

Hon. Mr. Macdonald: We will certainly have a lot more experience when we come back in three years' time.

Senator Flynn: You expect to come back?

Hon. Mr. Macdonald: One has to be optimistic.

Mr. Poissant: I should like to refer to the word "compensation." I have difficulty with the definition of "compensation" in the bill as it applies to subclause 20(5) where the excess compensation may have to be either reduced from future payments of a similar nature or perhaps be ordered to be paid to Her Majesty in right of Canada. As I understand it, the definition of the word "compensation" would seem to be the gross amount paid. If this gross amount paid were in excess of what he was normally entitled to and the administrator ordered him to pay an equal amount as a sort of penalty for the excess revenue, what will be taken into account, the gross amount or the net amount after taxes have been deducted at source?

Hon. Mr. Macdonald: That is a good question. Perhaps Mr. Cohen would like to comment on that.

Mr. M. A. Cohen, Assistant Deputy Minister, Tax Policy and Federal-Provincial Relations Branch, Department of Finance: It will be the net amount. You are referring to clause 20(5)?

Mr. Poissant: The side note is:

> Where excess revenue derived otherwise than in course of business.

Senator Flynn: The power of levying an amount.

Mr. Cohen: That is why the administrator makes such order as he deems appropriate. You will also find scattered through here that he may capture the amount or such part of the amount. These words are designed to allow for the kind of problem you raise.

Mr. Poissant: So in your regulations it would be referred to as the net amount?

Mr. Cohen: Whether it will be in the regulations or whether it will simply be what the administrator can do, I cannot specify at the moment, frankly, because I do not recollect. I would say not rore than 100 per cent; the combination of sanctions and taxes will not exceed 100 per cent.

Mr. Poissant: That will also take into account other deductions that could have been made; for instance, the withholding tax on dividends paid? Is the law to apply to withholding tax at source?

Senator Beaubien: Non-resident tax.

Mr. Poissant: Would it apply also to that type of excessive dividend? It would seem to apply to that type of payment. Let us say that 25 per cent tax at source was deducted and remitted to the Receiver General of Canada on dividends paid. Which amount will be taken into account in applying subclause 20(5)? You will have to take care of that withholding tax, I presume. Is that the intention?

Mr. Cohen: Yes, you have to take into account other tax levies that have been imposed.

The Chairman: Where will that be? In the regulations?

Mr. Cohen: I am not sure whether that will be spelled out in the regulations or flow out of what the administrator does.

The Chairman: The clear law is in the Income Tax Act requiring the deduction to be made.

Mr. Cohen: That is quite right.

The Chairman: That raises a question about a deemed dividend, which I mentioned to you beforehand. Under the Income Tax Act some payments are deemed to be dividends. How is it proposed to treat them? Something that is not in any sense a dividend for the purposes of dealing under the Income Tax Act is deemed to be a dividend.

Hon. Mr. Macdonald: Some appropriation of corporate surpluses that are really not dividends as such.

The Chairman: Or some loans.

Hon. Mr. Macdonald: After you, Mr. Cohen! You have a shot, and then I'll have a shot.

Mr. Cohen: First of all, it would obviously have to be a dividend within the definition of this bill; that is to say, it

would have to be a dividend as defined here, not as defined in the Income Tax Act. If there were an overlap you might have a cause for concern, but certainly you cannot impose a dividend restriction on something beyond what this bill talks about, which is a form of corporate distribution otherwise than on the winding up of the corporation. We have tried to take that problem into account in the regulations.

The Chairman: Certainly a deemed dividend is not a form of distribution; it is a dividend.

Mr. Cohen: That is beyond the scope of this bill.

The Chairman: So there could be situations where the Income Tax Act may provide certain levies and there is no conflict with the anti-inflation legislation at all.

Mr. Cohen: That is quite right; that is quite possible. The definition of "deemed dividend" in the Income Tax Act is different from this one. This one is broader in some respects.

The Chairman: If you look at it, the characteristics are entirely different.

Mr. Poissant: Earlier I asked a question about prices announced prior to October 14, and you say they should prevail. There also seems to be provision in the guidelines for increased profit over the 95 per cent rule when it is due to "unusual productivity gains resulting from the efforts of the firm." I take it for granted that one of them could be a major capital investment or new technology. How would this apply? Will each individual case be examined, or will this additional price that brought in this increment be fixed or reduced after a while? Will the regulations take care of this?

Hon. Mr. Macdonald: We would anticipate that the Anti-Inflation Board would have to examine the situation. The regulations will not be so specific as to put this matter beyond doubt in specific circumstances. The Anti-Inflation Board would have to examine the situation. Indeed, if a company came in with what was clearly in excess of the 95 per cent average of the pre-tax net profit in the five-year period, the Anti-Inflation Board would require the company to justify the fact that they had exceeded it. In that sense, I do not think it would be possible to capture that situation entirely by drafting regulations. This is where discretion will have to be with the board.

Mr. Poissant: If in year one a company has an excess of revenue over its 95 per cent pre-tax average of the five years, could that excess be set aside for a certain period to take care of some losses that could happen in year two, for instance? Or is the idea that as soon as the 95 per cent is exceeded it has to follow the pattern provided in the guideline? Or could it be set aside for (a) capital expenditures; or (b) could it take care of future losses over a three- or four-year average?

Hon. Mr. Macdonald: Well, generally speaking, it would be considered from year to year. I suppose if the company could come in and make a case on the current year's performance, that they do not anticipate having a good year and they can already see events which would put them in a difficult cost position in the year to come—and they cannot by any means see this level possibly continuing—they might be able to persuade the board that they should be entitled to, as you say, set that aside to retain that particular profit against a year ahead. That obviously would be a very tough one to deal with, for the board, because I am sure they would then be faced by a succession of pessimists who are going to come and say, "1975 was a good year, and things do look tough for this coming year." I am not anxious to encourage that. On the other hand, we have said in the White Paper that we recognize that nobody should be expected to continue to operate in a loss position. The board will have to show some flexibility there.

The Chairman: You can see it happening in cases where a company decides to phase out certain operations over a period of time, because on the other hand there are other operations that they are bringing along which may require capital expenditure. Now, they may not feel that immediately. The phasing out may be over a period of time, but that may affect the 95 per cent figure.

Hon. Mr. Macdonald: Indeed, it could. The circumstance which one could see is that they might decide they have had a losing operation in a particular area, which has affected their profitability, and they might bite the bullet and decide they are going to write that off. The year in which they did so, of course, would show a very poor profit picture.

The Chairman: Are you saying they would have to live with that?

Hon. Mr. Macdonald: What I am saying is that it is conceivable, under some circumstances, they could justify to the Anti-Inflation Board that, "Yes, we are high this year but we can identify events which are bound to occur and have an adverse effect on our profitability in the succeeding year."

The Chairman: I realize they need more than a crystal ball to convince the board.

Hon. Mr. Macdonald: Yes.

Mr. Poissant: Along the same line, excessive profit, could it be argued before the board for the same company, or any other company that is in the process of expansion, that the excess revenue could be used as self-financing for this implementation?

Hon. Mr. Macdonald: Primarily, no, not in relation to their domestic business.

Mr. Poissant: Not even if it was to prove that it would reduce their price in year three, because of new technology or new machinery?

Hon. Mr. Macdonald: I think on the whole, no. I think that is a pretty difficult element. We are concerned about the price level in year two as well. That is a problem.

Mr. Poissant: I believe Mr. Goodlet has some questions.

Mr. W. E. Goodlet, Consultant to the Committee: I wonder if I might ask a couple of general questions. I gather that the 95 per cent pre-tax profit margin was set as being a "rough justice" in relation to the cost pass-through.

Hon. Mr. Macdonald: Yes.

Mr. Goodlet: The two should be roughly equal. It seems to me this is valid where, let's say, prices increase at approximately 10 per cent; it works out reasonably well. In the event that there was a substantial diminution in the inflation rate and the prices did not increase by 10 per

cent, the 95 per cent formula would be diminishing profit whereas an increase beyond the 10 per cent on the price levels would produce a higher profit. Would there be any thought of adjusting the 95 per cent formula approach in the event that something turned out quite differently from what was anticipated?

Hon. Mr. Macdonald: We certainly would be examining the situation as time went on. I would have to say that no one would be more delighted than this administration if we found the rate of inflation could come down that way.

As you say, yes, it is really an attempt in this first year to provide that standard, as you may have noted, with the example in the book. If the external facts change on a broad basis, I think we would very definitely have to change the guideline in that respect.

Senator Flynn: You do expect that you will have to change them very frequently, do you not?

Hon. Mr. Macdonald: Early on in the game, we certainly do. As I said in my opening remarks, we anticipate that there will be situations which we have not taken into account, or where the application of the guidelines as they exist would appear to be inequitable, and under those circumstances we would have to make some changes.

Mr. Goodlet: I wonder if I could ask a fairly broad-range question. Mr. Poissant touched upon the question of unusual productivity. In the event that the gains and unusual profit are increased profits resulting from merely increased efficiency, just a general tightening up of operations which might result by the installation of new management in a corporation, would it be anticipated that the prices would have to be reduced to eliminate that extra profit?

Hon. Mr. Macdonald: We would hope that that would be passed on in the price of goods and services.

Mr. Goodlet: Then, somewhat related to that, if a corporation was running a loss line or a certain line of products that they were losing on and decided to discontinue that, the effect would be an increase in the overall profits. Again, would it be anticipated that the prices of the continuing products would be reduced to bring the profit level back down to what it was, including the offset for losses?

Hon. Mr. Macdonald: Yes.

Senator Flynn: Even below the price in force on October 13?

Hon. Mr. Macdonald: Yes. In that particular case, where the net profit margin standard is applied, then the standard would continue to apply. In terms of their pricing, they would be expected to bring the prices down to keep themselves within the profit standard, subject to some of the exceptions we have talked about specifically.

It may well be, of course, that they were entitled to move up the compensation to their employees, up to a maximum of 8 plus 2 per cent in the first year. The gains of the kind referred to may be counterbalanced by increases in compensation, but if on the balance of the accounts they turn out to have a greater profit than the standard, then it would be expected that the benefit of that would be passed on to their customers.

Senator Flynn: It is more than control of prices; it is excessive profit tax legislation.

Hon. Mr. Macdonald: Well, senator, it is really an attempt to control. It is recognized in many firms that it will be difficult to control the price of the individual items. You are really getting, indirectly, at price by the profit control.

Senator Beaubien: Are they not allowed 10 per cent like anyone else?

Hon. Mr. Macdonald: Not on the profit side. To that extent this is the difference in treatment. It is an attempt, not altogether successful, to persuade those on the compensation side that, indeed, management is being treated more harshly than those receiving compensation as employees.

Senator Smith: Has an estimate been made of the total number of staff which is likely to be needed within, say, the first year of this program?

Hon. Mr. Macdonald: Senator Smith, we have at the moment approximately 268 employees on staff, the great majority of them having been seconded from federal government service. I do not know if the chairman has indicated to us what he anticipates. However, I cannot give you an answer at the moment. Obviously, the more difficult it is to secure compliance with the guidelines, the larger the staff he will need.

Senator Smith: Following that up, may I ask whether it is hoped that the bulk of the total employees will be obtained in this way, being seconded from departments so that they can eventually return to their jobs?

Hon. Mr. Macdonald: We have been very conscious of the undesirability of increasing the Public Service. This certainly has been the initial effort, to take advantage of this. As time goes on and the Public Service becomes leaner, we hope, then it may be more difficult to achieve this.

Senator Smith: I suppose to the extent that you have to go out and hire people in the labour market, management market or whatever you want to call it, the more unhappy it will be for many when the program ends.

Hon. Mr. Macdonald: That will be a problem. Certainly, for a period of a number years we would be bringing people to positions in Ottawa which the demise of the program, which we hope will be relatively early, would leave without employment. So that does create a problem.

Senator Smith: That would tend to create some built-in pressure to delay the termination of the program, would it not?

Hon. Mr. Macdonald: I think the pressure at the political level will be to get rid of the program as soon as we can. I think the pressure at the political level will probably prevail.

Senator Macnaughton: In addition to the success of the program.

Senator Flynn: If by the application of the powers of the administrator under clause 20 there should be additional revenues to the government, will the additional revenues be passed on to the taxpayers?

Hon. Mr. Macdonald: I would have to say, Senator Flynn, that probably in terms of the Consolidated Revenue Fund becoming more comfortable there would be less of a necessity at budget time.

Senator Flynn: The income of the government does not come under these guidelines?

Hon. Mr. Macdonald: No, the income of the government does not come under the guidelines, although in the last few weeks we have been setting ourselves some guidelines with regard the outgo of the government.

Senator Flynn: The year 1975-76 would not be a good year for the government to establish a ceiling anyway.

Hon. Mr. Macdonald: I would have to say, senator, that it is difficult in the current year, which is now more than halfway through, to establish that kind of a reduction. A substantial part of the federal expenditure is, of course, in transfer payments either to provinces or to individuals. Even within our controllable programs—for example, programs within my former department of Energy, Mines and Resources—the budgeting of expenditures came in the summer when people on field trips were engaged in geological surveys and so on. So it is difficult to recover much in the current year; therefore, attention has been focused on 1976-77.

Senator Cook: Do you have any estimate or forecast of the total amount of restraints on the part of all governments—provincial, municipal and national?

Hon. Mr. Macdonald: I cannot give you a general figure, Senator Cook. My colleague, the President of the Treasury Board, will be able to announce shortly the kinds of restraints we intend to apply to ourselves, when he makes known our intentions with regard to the 1976-77 estimates. The position varies from province to province. Alberta, for example, has set itself an 11 per cent maximum on governmental increases. We have not an aggregate figure for them all at the moment.

Senator Cook: It would be more in the nature of setting limits on the increase rather than an actual decrease?

Hon. Mr. Macdonald: I anticipate that to be the situation. Governments, like individuals, do have to face inflation and do have to face higher interest rates, and in that sense it would be difficult to bring the government's payments down any more rapidly than the rate of inflation in the economy.

Senator Smith: That anticipates a question I was about to ask. I gather this year the hope is that the increase in government expenditures will be in the order of 15 to 16 per cent, while the rate of inflation is high enough but somewhat below that. Is there any reason why, subject, of course, to beginning new programs, government expenditures cannot be held to a rate of increase approximating that of the rate of increase of inflation?

Hon. Mr. Macdonald: Senator Smith, I think the question with respect to what stand we take would be what rates do we anticipate for the coming year in terms of both real growth and inflation. We hesitate to hang ourselves on a particular figure, but the figures you mentioned would really represent an aggregate of real growth plus the inflation we will experience. I do not know any way in which we can bring it down rapidly than that without a substantial reduction in urban services, including, of course, some of these substantial transfer payments that are made to individuals. It is difficult in a year of high inflation, for example, to try to reduce the payments under the old age security or indeed to reduce the oil subvention, and, of course, it is most difficult as well to reduce some of the transportation subsidies now being paid.

Senator Smith: I suppose I would not quarrel with the general statement, but since, as I understand the method of indexation, or whatever you wish to call it, in terms of the personal transfer of payments, they are related to the growth of inflation, therefore they should not increase at a greater rate than inflation does, unless, of course, you get a greater number of recipients.

Hon. Mr. Macdonald: That also is true, of course, with a growth in population. Obviously it is not growing as dramatically as it has in the past, but, with the gradual aging of the population, the number of candidates, for example, for the old age security and the guaranteed supplement can be expected to increase in time. I believe I am correct in saying that.

Senator Cook: Are equalization payments going up?

Hon. Mr. Macdonald: Yes, the equalization payments are going up. They are really based on the aggregate of returns to provincial governments based on the national formula. This has been moving up. For example, the equalization has gone up in the current year by quite a dramatic amount. I think I am right in saying to Senator Smith, for example, that the increment to Nova Scotia would have been up by about $50 million or $60 million.

Senator Smith: That would flow from the fact that somewhere else in the country than Nova Scotia the prosperity is much greater and, therefore, there will be more income.

Hon. Mr. Macdonald: That is right.

Senator Smith: It is a little difficult to fit that into the picture.

Senator Flynn: The federal government has decided not to pay to the provinces the excess profits from Alberta and the other oil-producing provinces.

Hon. Mr. Macdonald: What we have done, Senator Flynn, is instead of paying it directly to them we have subsidized the oil price for the provinces east of Ottawa. In that sense, while it has not been paid directly, it has been paid indirectly for keeping the oil price $4 below the world level.

Senator Asselin: In your White Paper you said this law would apply to companies with 500 employees or more and to construction companies with 20 employees. What will happen to those companies which have, say, 100 or 200 or 400 employees? Will they not have to submit to the law?

Hon. Mr. Macdonald: With the exception of a number of companies with respect to which at the start of the meeting I indicated we would be seeking a recommendation of the Anti-Inflation Board, the answer is that they would not be subject to the specific controls. The underlying assumption involved is that the competition in many cases will itself be effective in preventing those firms from increasing their prices.

Senator Asselin: And their wages?

Hon. Mr. Macdonald: Well, big firms in the field are in the position of being restrained, and then the smaller competitors will have difficulty on the market in getting higher prices, and this in turn will be a restraint on them in respect of their compensation to their own employees.

Senator Flynn: Are you quite certain that that will be the situation?

Hon. Mr. Macdonald: Senator Flynn, I cannot be sure that this will be true as an inflexible rule; but, certainly, my experience in running a price control system on the petroleum business was that it worked very effectively.

Senator Cook: Am I right in assuming that the board will be able to challenge a price, whether it is charged by a big corporation or a small corporation—that any price can be challenged?

Hon. Mr. Macdonald: The board will be able to challenge a price charged by a firm with 500 or more employees. A firm with less than that would not be directly subject to sanction. The board could, indeed, go to the smaller firm and say, "Look, we think you are ahead of the guidelines here and we think it is in the national interest that you do not do that." But if the firm in question said, "Whatever you think, nonetheless this is what we have decided to do," that would not be a situation which the board could refer to the administrator for some kind of retributive action.

Senator Flynn: Because you really have no power under this legislation to intervene in these cases.

Hon. Mr. Macdonald: The Anti-Inflation Board has the power to engage in exhortation, but it does not have the power to transfer it to the administrator for legal action.

Senator Flynn: You have deprived yourself of any jurisdiction over these groups.

Hon. Mr. Macdonald: We have made it selective in its application.

Senator Smith: On that point, is it not possible that the difficulties of not having such a large number of employers or companies under the guidelines would drive you to an interpretation of the words "strategic importance to the containment and reduction of inflation in Canada"—that would lead you to take the view that you would have to take them all in, because if you did not take them all in, the thing would not work?

Hon. Mr. Macdonald: There are some that are going to be more strategic than others. The list of industries that I mentioned to you, such as the grain handling people, the longshoremen, the trucking industry, and so on, are industries concerning which it is no extension of logic to say that they are of strategic importance. There will be others, perhaps in the entertainment field, for example, or in other areas, where it will be an inconvenience to Canadians if the prices go up, but which certaihly could not be described as being of strategic importance.

Senator Smith: The conflict, though, is that there is a very great number of them—I do not know if anyone has tried to estimate it—that will not come under the guidelines as they now exist, and who may decide, for reasons which are easy to understand, that they are not going to pay much attention to the board when it comes around to talk to them, because they know the board cannot do much about it. This may become so prevalent that it will be necessary to interpret this phrase so as to take them all in.

Hon. Mr. Macdonald: I think that we have sought to restrain ourselves, and it was a deliberate restraint that we, as a government, put on ourselves, because we did not want to be able too easily to expand the number of firms to which this can be applied. We set out to be selective right from the start, but a situation could develop where, if there is widespread non-compliance—that is not quite the word, perhaps I should say widespread "disrespect" for the standards, then we, over a period of time, might have to consider whether a more comprehensive set of controls would be required.

I think the view of the government would be that if you get into a situation where there is widespread disrespect for the program by those who are not covered by direct sanctions, we would have to pause and reflect on whether a more comprehensive set of controls would have to be applied at that time. If that was occurring, and price increases were becoming endemic, then very clearly the program in its present form would not be working and we would have to consider whether a more extensive one would be required. We hope that the prospect of a more extensive program would in itself be a disincentive, and would discourage people from making hay while that particular sun was shining.

Senator Smith: I take it that if things got that bad, instead of interpreting in a larger way this phrase referring to strategic importance, the controls and guidelines themselves would be changed.

Hon. Mr. Macdonald: I think we would be back looking for a suitable amendment of the statute itself in those circumstances.

Senator Flynn: You do not want those right now?

Hon. Mr. Macdonald: No; thank you very much.

Senator Molson: Mr. Chairman, I have seen some of the minister's television appearances, and also some of those of Mr. Pepin. There seems to be considerable anxiety in the minds of the public about at least two main things, which are: first, that there has been no demonstration that prices can be controlled as well as wages; and, secondly, that there has been no genuine demonstration of the government's intention to cut down spending. The minister has answered the latter question to some extent here. He said that this question is being reviewed. What rather puzzles me, however, is that announcements continue to be made of expenditures on things that seem to be of very little importance, one of which I brought up this afternoon in the Senate. It appears that there is to be an extension of a national park in the Thousand Islands area involving an amount of $30 million. This does not seem to me to be quite the time to be going ahead with programs of that kind.

Again, not very long ago plans were announced to spend, on the other side of the river here, $120 million, or $320 million—I have forgotten the exact amount—on development. Surely these are some of the things that could be slowed down or changed for the time being.

From another point of view, there are many people who are saying that while the expression "means test" is a very nasty one, it is at the same time very difficult to justify the payment of some of the universal social benefits to people who are extremely well off. Let us take, for example, the payment of baby bonuses to senators. This is not reasonable.

Senator Flynn: We are no longer babies.

Senator Molson: Some of these expenditures do not seem, to the average man in the street, to be reasonable. If

we are really facing this very dire situation where every effort is to be made to bring the whole problem into perspective, and to control it, why are we not grasping the nettle in a few of these areas in which expenditures are being made that I find very difficult to understand?

Hon. Mr. Macdonald: Well, senator, we are in the process of grasping the nettle at the moment, and the effect of this grasping will be evident, we think, within a matter of a couple of weeks, when the President of the Treasury Board announces a number of policy changes that will occur as a result of a decision to make substantial cuts from the 1976-77 estimates.

What Mr. Chrétien has done, actually, is to go to all the departments to seek a reduction from them, and rather than specifying particular reductions he has preferred to say to each one, "You are going to have less money next year. You have to indicate to me how you choose not to spend it."

It could well be that there may be an appropriate moment when we can acquire, for example, additional properties in the Thousand Islands area, which is land which undoubtedly will be going up in price in the years to come. I think that at particular expenditure probably reflects the 1975-76 program rather than the one for the following year. I can certainly see that in terms of the government's own accommodation, for example, every effort should be made to postpone building plans.

Senator Molson: But why can we not stop buying parks or land? There is no commitment in that regard.

Hon. Mr. Macdonald: The purpose of long-range program in that area is to try to provide national parks for Canadians before the accessible and available land has been fully developed for private purposes.

Senator Molson: But we are in a crisis, to use a word that several members of the government have made use of, if I am not mistaken. This is a time when we have to do things that we otherwise would not want to do. I would have thought that the acquisition of property not immediately needed for a definite purpose would be a program about which we could say, "Well, for the moment, or for 36 months, or 18 months, we are going to stop buying land for these non-vital purposes."

Hon. Mr. Macdonald: I cannot really argue against that.

Senator Molson: It was not my purpose to win an argument. What I was hoping to hear was that we were going to make some savings.

Hon. Mr. Macdonald: There will certainly be some cuts, senator. I would hesitate to attempt to give you the assurance at this time that there will be no more properties acquired in the Thousand Islands area, because, as sure as shooting, within the next six weeks such property will be acquired; but I think that is a good example of the type of government priority that can be postponed as, indeed, expanding accommodation for the government itself can be postponed.

[*Translation*]

Senator Asselin: Mr. Minister, some provinces have indicated that they might choose to establish their own control machinery; other provinces have indicated that they might use the Federal Government control machinery. Do many provinces intend to use the Federal Government control machinery?

The Honourable Mr. Macdonald: I am sorry, Senator Asselin, but it still is not clear. However, it is clear that the Province of Quebec has chosen the Section 4 system for its Commission, as far as the provincial sectors are concerned. Ontario has, however, indicated that it would choose the Federal controls. Most of the provinces have not yet indicated what their intentions are. Saskatchewan stated, at the last ministerial conference, that it might quite possibly choose neither and that it would proceed with the indirect implementation of the Federal controls. We hope that most provinces will choose the Federal scheme in order to reach uniform implementation. However, we are aware of the responses given by each province and I can say that most of them are waiting for the rules to be issued.

Senator Asselin: Just like us.

The Honourable Mr. Macdonald: Just like everybody else, to determine which one will be chosen.

Senator Asselin: In the case where a province would have decided to establish its own control mechanism, would federal subsidies be paid to that province?

The Honourable M. Macdonald: No, they would not:

Senator Asselin: To date do you believe that you will obtain the provinces'cooperation for this program over a three-year period? Are there provinces that would like to avail themselves of your plan for 18 months only, in order to reassess the economy of the country?

The Honourable M. Macdonald: I must say that some may have a three-year program, but most provinces have indicated that they want to have the opportunity to examine the program after 18 months. As far as the Federal program, is concerned, they have suggested that by the end of April 1977, the economy should be reassessed in order to renew the agreements, if necessary. One of the important aspects of the three-year program is that, for such a period, we can be sure that as far as salary increases are concerned, for example, if a province chooses a one-and-a-half-year period of time, they might quite possibly wait until the end. After that, these will be a huge demand.

Senator Asselin: You will still be faced will the same dangers after three years?

The Honourable M. Macdonald: We are looking for a gradual absorption of the inflation rate. We also hope that changes will occur in the economy and in the minds of groups.

[*Text*]

Senator Asselin: I would like you to explain to the committee also what you mentioned in the house, that after a certain amount of time a number of members can bring a motion before the house. Will this motion need the consensus of the house?

Hon. Mr. Macdonald: Is this clause 46?

Senator Asselin: Yes, I think it is clause 46(6). I would like you to explain that to the committee.

Senator Flynn: This deals with the abrogation of the act by resolution of the House of Commons only, without concurrence of the Senate.

Hon. Mr. Macdonald: In the first situation it is both houses of Parliament.

Senator Flynn: Yes, and then in subsclause (6) it is only the House of Commons.

Hon. Mr. Macdonald: I must confess that is a blind spot. I cannot recall precisely, but I think that probably arose out of the debate which occurred in the house itself. It was really something that was referred to in second reading, and then this occurred within the committee. There was a loud discussion at that time about bringing it back into the house itself, and this was intended to respond to that particular point of view. Actually, Mr. Cohen reminds me that it is identical to provisions contained in the Income Tax Act two or three years ago.

Senator Molson: We did not like it.

Hon. Mr. Macdonald: I am getting that message right now.

Senator Molson: Surely this is a matter for Parliament?

Hon. Mr. Macdonald: Certainly in the original bill, as you will see, Senator Molson, it was in both houses of Parliament.

Senator Flynn: I do not see why the same mechanics could not be applied.

Senator Asselin: Would you accept that amendment, "both houses of Parliament"?

Hon. Mr. Macdonald: I would prefer that the matter not go back to the house to be debated again; I am concerned about it.

Senator Flynn: Why not?

Hon. Mr. Macdonald: There seems to have been some criticism of the government for not having the legislation in place, and for that reason I would be concerned about any futher delay.

Senator Molson: We get that quite often, Mr. Minister, in this house. We can understand it, but it does not necessarily make us happier about co-operating.

Hon. Mr. Macdonald: I can understand that, senator, and I suppose that if the House of Commons ran its business with more dispatch no doubt we would not be faced with that situation. As house leader I once attempted to correct that, but I did not get unanimous support. I must say that until Senator Asselin mentioned it it had not come to my attention that there is a difference in treatment within clause 46. It was not a conscious difference; one could regard it as responding to the pressures of the moment.

Senator Flynn: Did you submit it to Stanley Knowles?

Hon. Mr. Macdonald: No; I have never shared his views with regard to the Senate, nor many other of his views.

Senator Flynn: Do you see any practical difference for the government were we to amend clause 46(2) by replacing "December 31, 1978" by "March 31, 1977" in the first and sixth lines?

Hon. Mr. Macdonald: Yes, I think that it is important that we have really committed ourselves to the three-year program. We really see it continuing for three years, and people would know that it would continue for three years.

Senator Flynn: But do you know that it can be terminated after 18 months under this clause?

Hon. Mr. Macdonald: They know that we have committed ourselves to a three-year program, but it may come to an end if circumstances then require it. So it seems to me that it is different to say that it will be totally at an end unless the circumstances warrant it.

Senator Flynn: Unless you wish to prolong it.

Hon. Mr. Macdonald: Yes, it would be a fresh situation and a hiatus until the bill is introduced.

Senator Flynn: It would not be a greater problem than if a motion to terminate the act were introduced in the House of Commons. Then you would have the same option you have here after three years to prolong it. If you have the right to prolong it after 18 months, or after three years, you are in practically the same position, technically speaking.

Hon. Mr. Macdonald: Well, I suppose it is declaring to the public that we regard the three-year period as the period during which it will operate.

Senator Flynn: And you think it is better.

Hon. Mr. Macdonald: We have structured it that way, on the assumption that it will be a gradual reduction over three years, rather than a steep decline, which could have very adverse effects on unemployment in Canada.

Senator Flynn: I suppose it is a question of judgment. Your Mr. Lougheed apparently is not in agreement. Why?

Hon. Mr. Macdonald: I think he is your Mr. Lougheed.

Senator Flynn: I did not say mine; he is the Premier of Alberta. You are "my minister", also, whether I like it or not, but I do like it, I must say.

Hon. Mr. Macdonald: Thank you.

Senator Flynn: Perhaps, Mr. Chairman, I could ask one small question. So far as clause 35 is concerned . . .

> No costs may be awarded by the Appeal Tribunal on the disposition of an appeal.

. . . it is already provided that if you want to make an appeal against an order, you make payment to Her Majesty, but you have to deposit the amount in order to be heard. Furthermore, if you win your appeal, you are not even entitled to costs. Don't you think that with such exceptional legislation, which is close to expropriation, costs could be awarded when you succeed in an appeal?

Hon. Mr. Macdonald: I suppose it could be said that it cuts both ways, senator. If you lose the appeal . . .

Senator Flynn: You said it cuts both ways. I do not mind that so much. In a case like that the administrator has extreme powers to order a levy. He decides the imposition either of what might be called a tax or a fine; and, on top of that, he has the power to add 25 per cent if he is satisfied that the contravention was done knowingly. It is extreme powers. I find that these appeals are not a very good remedy. It is very hard to succeed, with all these obstacles that are in the way, including the costs.

Hon. Mr. Macdonald: The motivation really was to encourage people who felt aggrieved to go to the Appeal Tribunal. On the whole, the risk of having costs awarded against them would be a disincentive on their part. If you are calculating the downside risk in not having to pay Crown costs . . .

Senator Flynn: You have already put up the amount of the order . . .

Senator Smith: It is not necessary I suggest, Mr. Chairman, to have both parties denied costs. Both parties get costs in case of success or failure. It is quite possible to have it so that the appellant, if successful, does get costs, and the Crown, if it is successful, does not get costs. That would be similar to the situation mentioned earlier today by Senator Flynn where in many laws concerning compensation for expropriation the Crown pays the whole shot.

Senator Flynn: Unless it is a foolish appeal.

Senator Smith: If he gets 85 per cent of the award, the Crown pays.

Hon. Mr. Macdonald: I think I will have to appeal to Mr. Cohen on this one. My recollection is that with federal administrator tribunals like the Tax Appeal Board the cost does not come into it.

Mr. Cohen: Unless the administrative appeal costs are relatively small.

Hon. Mr. Macdonald: The next stage obviously would be to the Appeal tribunal.

Senator Flynn: It seems to me that the administrator has extreme powers under this act and appeals should be facilitated a little more than they are under these provisions.

Mr. Poissant: Would those costs be deductible for tax purposes?

Hon. Mr. Macdonald: I do not think they have been traditionally.

Senator Molson: Even if they won?

Hon. Mr. Macdonald: Even if they won.

Senator Molson: Mr. Chairman, the minister referred to the Income Tax Act having a similar provision, that the House of Commons does not need any help from the Senate in doing something. Is there any other act that expires on a motion passing in either house of Parliament? This act expires on a date specified in a motion. It is not a bill; it is a motion. As you know, my legal training was rather brief. Does this occur anywhere else, where an act of Parliament can expire on passing a motion? It sounds odd to me.

Mr. Cohen: My recollection goes back to then this appeared first in the Income Tax Act. My recollection is that it was unique, that it was the first. I have heard of no other precedents since

Senator McIlraith: The argument at that time, and the reason why it was put forward in that way, was because it was a matter peculiarly within the responsibility of the House of Commons, because it was imposing a tax. That was the argument made at the time for that provision.

(*Translation*)

Senator Asselin: If 50 Members of Parliament sign a petition which is accepted by the House of Commons, will there then be grounds to present a bill in Parliament to amend the Act?

Hon. Mr. Macdonald: There would be no ground for that because, by that time, the project will have come to an end.

Senator Asselin: This would be an anti-constitutional decision because Parliament comprises both the Senate and the House of Commons.

Hon. Mr. Macdonald: Why not? If the Senate agrees with this section, you are giving one section of Parliament the authority to put an end to that.

[*Text*]

Senator Asselin: You cannot do it; it is impossible.

Hon. Mr. Macdonald: I think it can be done if you agree in this bill that it can be done.

Senator Flynn: And if we do not agree?

Hon. Mr. Macdonald: If you do not agree, then I agree that it cannot be done.

The Chairman: Are there any other questions?

Senator Flynn: All we can do is wish the minister good luck. He has his hands full.

Hon. Mr. Macdonald: Thank you very much, Senator Flynn.

The Chairman: Is the committee ready to deal with the bill?

Senator Macnaughton: Ready.

The Chairman: Is there a motion?

Senator Macnaughton: I move that we report the bill . . .

Senator Flynn: I thought we were going to examine the bill clause by clause.

The Chairman: I had proposed to put the question as to whether the bill should be reported without amendment, rather than to go through it clause by clause.

Senator Flynn: Well, I am not sure that I will not move some amendments, at least for the sake of the record.

Senator Macnaughton: If you are not sure, why would you raise it?

Senator Cook: Why not do it on third reading?

Senator Flynn: I might as well put them on the record and get Senator Macnaughton's opinion on them. He has been rather silent up to now.

Senator Macnaughton: I will give you a ruling right now, if you wish!

The Chairman: With the motion that I am suggesting, the problem would be resolved. I have a motion by Senator Macnaughton that the bill be reported without amendment.

Senator Flynn: If the motion is adopted on division, we cannot move any amendment.

The Chairman: No, not after that.

Senator Flynn: Is that a fair way of dealing with a bill when someone wants to have it considered clause by clause? Would that not be some kind of closure?

Senator Asselin: Guillotine!

The Chairman: I think the question as to whether it is a fair method or not is a question for the committee. The chairman is only one member of the committee.

Senator Flynn: I was not imputing to you any kind of motive. Perhaps Senator Macnaughton's motion would have that effect. If so, perhaps he wishes to withdraw it for the time being.

The Chairman: I asked the committee whether there were any other questions.

Senator Flynn: Yes—questions. We were dealing generally with the bill, and having the minister with us today was a great advantage and a great pleasure, but that does not mean that our work is concluded.

Senator Macnaughton: Mr. Chairman, to be fair to the committee, perhaps Senator Flynn could indicate any clause to which he wishes to move an amendment.

Senator Flynn: I would move that clause 35 be deleted. Clause 35 leaves to the discretion of the Appeal Tribunal whether costs should be awarded or not.

The Chairman: What is your motion?

Senator Flynn: I move that clause 35 be deleted and that the subsequent clauses be re-numbered accordingly.

The Chairman: The committee has heard the motion. Those in favour of Senator Flynn's motion, please indicate. . . Those against Senator Flynn's motion, please indicate. . . I declare the motion lost.

Are there any further motions?

Senator Flynn: Yes, I have an amendment to move to clause 46. I move an amendment to clause 46(2), the first line, replacing the date "December 31, 1978," with "March 31, 1977,". And in line 12 "December 31, 1978" would be replaced by "March 31, 1977."

The Chairman: That is in subclause (2) of clause 46?

Senator Flynn: That is right.

The Chairman: Honourable senators, you have heard the motion. All those in favour of the motion, please indicate?—Those opposed to the motion?—The motion is lost.

Senator Asselin: We will come back to it on third reading.

The Chairman: Are there any further amendments?

Senator Molson: I wish to move an amendment to clause 46(6), to insert the words "and concurred in by the Senate". You cannot concur in a motion of the House of Commons. I want to have the two houses. In the last line or two there should be something about concurrence of the Senate.

Senator Cook: "—approved by the House and the Senate".

Senator Flynn: You would have to amend the whole clause. It would have to read, "this Act expires on the date that is specified in the motion passed by the Senate."

The Chairman: Let me be clear. Where it says:

> . . . if the motion, with or without amendments, is approved by the House,

You want to add what?

Senator Molson: A similar motion by the Senate.

The Chairman: Are the words you wish to add, "a similar motion passed by the Senate"?

Senator Molson: I do not know the exact words.

Senator Flynn: I think at least they would cover the essentials.

Senator Beaubien: That is the meaning.

Senator Flynn: If the principle is approved, we can have a drafting committee.

Senator Smith: Why cannot you simply add after the word "House" the words, "and the Senate"?

Senator Flynn: Because of what comes before. You have to have fifty members.

Senator Smith: You could say:

> . . . if the motion, with or without amendments, is approved by the House and the Senate, this Act expires on the date that is specified in the motion.

Senator Molson: We shall have to ask the Law Clerk.

Senator McIlraith: The point being made is clear enough. I think it would require some drafting to get the appropriate, precise language, which we do not have at the moment.

Senator Flynn: We could have a vote on the principle.

Senator McIlraith: On the principle, yes.

Senator Flynn: If we agree to that, we will get it properly drafted.

Senator Molson: I should like to add one other thing. I do not want to make a speech about it. Today is the second occasion on which we have been confronted with this. There will be a third, fourth and fifth, unless at some stage the Senate stands up and says, "We are part of Parliament, and if there are to be means of creating or ending legislation we have a proper role to fill." That is my view.

The Chairman: The purpose of your motion is to add, after the words "by the House" . . .

Senator Molson: A similar motion approved by the Senate.

Senator Beaubien: "with concurrence of the Senate."

The Chairman: That is the substance of it, in any event?

All right, do the members of the committee understand the substance of the amendment proposed by Senator Molson? . . . Those in favour of the amendment proposed by Senator Molson, will you please raise your hand? . .t. Those opposed? It is a tied vote. The motion is lost.

The Chairman: Are there any other motions?

Senator Molson: Third reading.

Senator Asselin: It is a very bad precedent. We will have to do something about that.

The Chairman: Order, please!

Senator Flynn: Mr. Chairman, Senator Phillips has underlined that this is the third time we have been faced with a similar procedure, ignoring the Senate.

Senator Phillips: And the second time this session.

Senator Macnaughton: Do you not think we made the point today with the minister some 20 minutes ago?

Senator Molson: The next will be another department.

Senator Phillips: The change will be . . .

The Chairman: Order, please!

Senator Molson: The last time it was the Minister of National Revenue; this time the Minister of Finance; and there could be another one.

Senator Cook: I agree. However, at this point in time . . .

The Chairman: In any event, the motion has been disposed of. Are there any other motions?

Senator Lang: Could you make some reference to the general feeling of the committee in your report, with respect to this? Although I voted against the amendment, I did so with the deepest regret.

Senator Cook: Hear, hear!

Senator Lang: I only do so because I feel time is of the essence in the passage of this piece of legislation. I would like to see in our report on this bill mention made of our general disapproval of the way this section is framed.

The Chairman: If that is the wish of the committee, I will see that in the report there is a particular reference developed, without sparing the number of words.

Senator Flynn: Agreed.

Senator Macnaughton: That is unanimous.

The Chairman: Are there any other motion to be made at this time?

Senator Flynn: Senator Macnaughton may make his.

The Chairman: Senator Macnaughton's motion, as I would put it, is that we report the bill without amendment.

Senator Flynn: On division.

Senator Smith: On division.

Senator Flynn: It is agreed.

Senator Cook: Agreed.

The Chairman: I adjourn this meeting until tomorrow morning at 9.30, when we turn to the Bankruptcy Bill.

I will endeavour to have a draft made during the morning so that I can indicate to you the language that I propose be used, as suggested by Senator Lang, to indicate the disapproval of the Senate of this form of proposing to deal with legislation which ignores the Senate.

You will note the chairman did not vote. The motion was lost on a tied vote.

Senator Flynn: Mr. Chairman, I thought it was the intention of the committee to call Mr. Jean-Luc Pepin.

Senator Molson: Next year.

Senator Flynn: He could have come and smiled upon us.

The Chairman: We will adjourn until tomorrow morning.

The committee adjourned.

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FIRST SESSION—THIRTIETH PARLIAMENT

1974-75

THE SENATE OF CANADA

PROCEEDINGS OF THE

STANDING SENATE COMMITTEE ON

BANKING, TRADE AND COMMERCE

The Honourable SALTER A. HAYDEN, *Chairman*

Issue No. 72

WEDNESDAY, DECEMBER 10, 1975

Twelfth & Final Proceedings on:

"The Subject-Matter of Bill C-60, Bankruptcy Act, 1975"

REPORT OF THE COMMITTEE

(Witnesses: See Minutes of Proceedings)

29881—1

THE STANDING SENATE COMMITTEE ON BANKING, TRADE AND COMMERCE

The Honourable Salter A. Hayden, *Chairman*

The Honourable Senators:

Barrow	Hayden
Beaubien	Hays
Buckwold	Laird
Connolly (*Ottawa West*)	Lang
Cook	Macnaughton
Desruisseaux	McIlraith
Everett	Molson
*Flynn	*Perrault
Gélinas	Smith (*Colchester*)
Haig	Sullivan
	Walker—(19)

**Ex officio* members

(Quorum 5)

Order of Reference

Extract from the Minutes of the Proceedings of the Senate, May 13, 1975.

"The Honourable Senator Hayden moved, seconded by the Honourable Senator Bourget, P.C.:

That the Standing Senate Committee on Banking, Trade and Commerce be authorized to examine and report upon the subject-matter of the Bill C-60, intituled: "An Act respecting bankruptcy and insolvency", in advance of the said Bill coming before the Senate, or any matter relating thereto; and

That the Committee have power to engage the services of such counsel, staff and technical advisers as may be necessary for the purpose of the said examination.

After debate, and—
The question being put on the motion, it was—
Resolved in the affirmative."

Robert Fortier,
Clerk of the Senate.

Minutes of Proceedings

Wednesday, December 10, 1975
(94)

Pursuant to adjournment and notice the Standing Senate Committee on Banking, Trade and Commerce met this day at 9:30 a.m. *in camera*.

Subject: "The *subject-matter* of Bill C-60—Bankruptcy Act, 1975".

Present: The Honourable Senators Hayden (*Chairman*), Beaubien, Cook, Desruisseaux, Flynn, Macnaughton, Molson and Smith (*Colchester*). (8)

In Attendance: Messrs. David E. Baird and Melvin C. Zwaig, Advisors to the Committee.

The Committee proceeded to the examination of certain proposed recommendations respecting the above Bill.

Following discussion, and upon motion duly put, it was *Resolved* that:—The number of printed copies of the Committee Proceedings of this date be increased to 1500 copies in English and 500 copies in French.

Following discussion, and upon motion duly put, it was *Resolved* that a Report be made to the Senate incorporating the above mentioned recommendations.

At 11:30 a.m., the Committee adjourned to the call of the Chairman.

ATTEST:

Frank A. Jackson,
Clerk of the Committee.

Report of the Committee

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Report of the Committee

INTRODUCTION

On May 13, 1975, the Senate authorized the Standing Senate Committee on Banking, Trade and Commerce to examine and report on the subject matter of Bill C-60 entitled "An Act Respecting Bankruptcy and Insolvency" in advance of the said Bill coming before the Senate. Since that date your Committee has received written submissions from the interested parties listed on Schedule "A" to this Report. In addition to the written submissions, oral presentations have been made by representatives of the associations listed on Schedule "B" attached hereto and the advisors to the Committee have presented a detailed explanation and analysis of the Bill.

Bill C-60 is intended to replace the following statutes which will be repealed, The Bankruptcy Act, The Companies Creditors' Arrangement Act and The Farmers' Creditors' Arrangement Act. In addition, The Winding-Up Act of Canada will no longer be applicable to the winding-up of insolvent companies. Bill C-60 also brings within its jurisdiction the winding-up of insolvent banks, railways and loan, trust and insurance companies. Your Committee has considered the issue of whether or not improvements in the bankruptcy and insolvency legislation could be achieved by amending the existing Act. The effect of Bill C-60 is that existing jurisprudence interpreting the provisions of the present Bankruptcy Act will have little direct value. However, this is the inevitable result of legislative reform.

Bill C-60 introduces many new terms, concepts and procedures which are a very great improvement over the terms of the present Bankruptcy Act. It would be difficult and extremely time consuming to incorporate these provisions into the existing Bankruptcy Act. Your Committee is, therefore, prepared to accept the principle that a completely new Bankruptcy Act should be prepared.

Many changes are required in Bill C-60 in order to reflect a proper balance among the rights of creditors, debtors and the public interest. The draftsmen of Bill C-60 appear to emphasize the rights of debtors to obtain rehabilitation and relief from their debts at the expense of the rights of creditors. From an administrative point of view many functions previously handled by private trustees and by the Registrar in Bankruptcy are delegated to the Bankruptcy Administrator, an employee of the federal government. Your Committee is concerned that this delegation will significantly increase the cost of bankruptcy administration to the taxpayer. It is very difficult to determine whether the additional benefits achieved will justify the increased cost.

Submissions received by your Committee have mentioned technical flaws in the definitions and the drafting of sections. These submissions have been made available to the Department of Consumer and Corporate Affairs and if the legislation is redrafted we would recommend that the submissions be considered although they are not mentioned in this report. In this report we have attempted to outline the most important changes that your Committee would recommend in Bill C-60.

TERMINOLOGY

The language and terms used in Bill C-60 is somewhat cumbersome and confusing. In order that the provisions of any legislation be understood the use of simple and meaningful language is important.

RECOMMENDATIONS

1. We recommend that the Bankruptcy Administrator be named Bankruptcy Supervisor; this would more closely describe his role in the bankruptcy and arrangement process.

2. The Bill refers to a "Proposal" and is used in the context of an "offer", which "offer" if accepted becomes an "Arrangement". In our opinion, this is a confusing use of language and the term "Arrangement" should be used throughout.

3. We recommend that the terms pertaining to arrangements should be abbreviated as follows:

> "Arrangement by way of Composition" should be abbreviated to
>
> "Composition Arrangement";
>
> "Arrangement by way of Extension of Time" should be abbreviated to
>
> "Extension Arrangement",

and the term "preventive commercial arrangement" should be deleted as a preventive commercial arrangement only appears to prevent a bankruptcy.

4. The Bill uses the term "Bankruptcy Order" as opposed to the terminology under the present Bankruptcy Act of "a Receiving order in Bankruptcy" which change in terminology we are in accord with. As to the word "petition" we recommend that the Bill should refer to a "voluntary petition" or an "involuntary petition" so as to clarify exactly what type of proceedings have been followed.

5. The "Certificate of Non-Responsibility" should be changed to "Certificate of Discharge".

ADMINISTRATION

ADMINISTRATOR

Bill C-60 provides for the appointment of bankruptcy administrators in each district who are full-time employees of the Office of the Superintendent of Bankruptcy. The bankruptcy administrator will assume the functions presently carried out by the official receiver, the registrar, and in some instances the trustee in bankruptcy. In addition to performing his tasks under the present Act which are principally of an administrative and investigatory nature, his function will be augmented by his involvement with the small debtor arrangement program, consumer/debtor bankruptcies, and he will also administer commercial bankruptcies where a private trustee cannot be found to administer the same or dies during the course of his administration.

The administrator, when acting in the capacity of a trustee, will be entitled to receive the same remuneration and expenses as a private trustee and will have his accounts taxed by his own superior, namely, The Superintendent of Bankruptcy.

Under certain conditions, the office of the official receiver presently administers "no asset personal bankruptcy" cases for a fee of fifty dollars ($50). In order for a personal bankruptcy file to qualify for the fifty dollar ($50) fee and to be administered by the official receiver, the insolvent bankrupt must earn less than three thousand dollars ($3,000) per annum if he is single and less than five thousand dollars ($5,000) per annum if he is married. These minimum amounts are increased by five hundred dollars ($500) per annum for every dependent which he

supports; also, the debts must not have been business debts.

The Bill proposes that the bankruptcy administrator should administer arrangements for the consumer debtor.

The Bill gives the administrator the sole authority to oppose the discharge of a bankrupt or to apply to the Court for an order imposing the status of "deemed bankrupt" on an officer, director or agent of a bankrupt corporation.

Under the present Bankruptcy Act there appears to be a duplication of work performed by the Office of the Superintendent of Bankruptcy and the Registrar in respect of the taxation of trustee accounts. It is obvious that for this reason the draftsmen of Bill C-60 propose to eliminate the function of the Registrar.

The Background Papers which were released by the Department of Consumer and Corporate Affairs at the time Bill C-60 was tabled in the House of Commons indicate that the administrator will be directly involved in the financial rehabilitation of consumer/wage-earner debtors. There does not seem to be a rehabilitation process included in Bill C-60 unless the draftsmen are referring to the administrator preparing the arrangement as a form of rehabilitation.

The designation of the officer of the Superintendent of Bankruptcy as "Bankruptcy Administrator" is a misnomer and recommendation is made that his title should be "Bankruptcy Supervisor".

RECOMMENDATIONS

1. The office of the Superintendent of Bankruptcy is prensently geared to handle "no asset personal bankruptcy" cases and, accordingly, we concur that their present policy should be so extended to include all "no asset personal bankruptcy" cases as we deplore the necessity of honest financial hardship cases being required to pay a fee in order to go bankrupt and free themselves of their debts. Private trustees should also be permitted to handle "no asset bankruptcies".

2. We are in accord with the provision whereby the administrator will administer arrangements for the consumer debtor; however, the Bill proposes to give creditors very little say in the administration of consumer and wage-earner debtor arrangements. We are of the opinion that necessary amendments should be made to the Bill whereby creditors have substantially more input in arrangements filed with the administrator.

3. We are of the opinion that the administrator must obtain input from interested creditors when opposing discharges and when applying to the court for an order imposing the status of "deemed bankrupt" and must not be granted the sole right to act independent of the trustee, the creditors and the inspectors of a particular file.

TRUSTEE

(a) LICENSING OF TRUSTEES

The Bill proposes that the Superintendent of Bankruptcy and his deputies will continue to be appointed by the Minister of Consumer and Corporate Affairs. It is however also proposed that the Superintendent of Bankruptcy's only obligation to the Minister of Consumer and Corporate Affairs is to report to him on an annual basis on the administration of the Bankruptcy Act. Appointments both to the office of the Superintendent of Bankruptcy and of licensing trustees were heretofore made by the Minister of Consumer and Corporate Affairs on the recommendation of the Superintendent of Bankruptcy. These appointments will now solely be within the discretion of the Superintendent of Bankruptcy.

The Bill recommends an extension of the present procedure which provides for the issuance and renewal of a trustee's license for a given term. The Bill suggests that the term not exceed two years. We understand the renewal of licenses to be a cumbersome procedure and should be automatic unless something has come to the attention of the office of the Superintendent of Bankruptcy which would cause the trustee's license not to be renewed. Provisions have been made to facilitate the licensing of corporate trustees thereby overcoming the difficulties presently encountered in obtaining authorization to so act in several provinces. Also the Bill provides for the Superintendent of Bankruptcy to remove a trustee's license summarily without provision for an appeal process.

(b) TRUSTEE AND INTERIM RECEIVER

There appears to be a double standard created as to the duty of care that must be exercised by the interim receiver and trustee under Section 35 of the Bill and that which must be exercised by the secured creditor under Section 240(5).

RECOMMENDATIONS

1. It is our opinion that the Minister of Consumer and Corporate Affairs plays a vital role in the appointments to the Office of the Superintendent of Bankruptcy both as an administrative control and as a cost control and, accordingly, it is our opinion that these appointments together with the renewal and issuance of trustee's licenses should not be left solely to the discretion of the Superintendent of Bankruptcy. The procedures now instituted should continue under any future legislation. We have been advised by representatives of the Office of the Superintendent of Bankruptcy that under the present procedure there may be a delay in this area of administration. We, however, do not believe this delay to be of any great significance.

2. With regard to corporate licensing we recommend that Section 18(2) be amended to read:

> "Every corporation that holds a license may carry on the business of a trustee in bankruptcy or as a receiver throughout Canada and shall not, in respect of its operations as a trustee in bankruptcy or as a receiver, be construed to be carrying on the business of a trust company".

3. We recommend that there be an appeal process available directly to the court for the trustee who loses his license.

4. We recommend that Section 35 be amended to establish a higher standard of care to be imposed upon interim receivers and trustees.

(c) DUTIES AND RESPONSIBILITIES OF TRUSTEES

The Bill provides that if at a first meeting of creditors, duly called, a quorum does not attend within one half hour of the time called for the meeting, the meeting is deemed to have been held. This is a good provision as many instances have arisen in the past where creditors have not attended and a new meeting had to be called. Thus, the administration of an estate was delayed.

Under the present Bankruptcy Act, the trustee is required to prepare and file all tax returns which were required to be filed by the bankrupt and which were not filed as at the date of the bankruptcy. This was both a

very costly practice and one which did not necessarily produce a recovery for the creditors. The Bill proposes to do away with this requirement and this elimination is welcome.

The present practice is for a trustee in bankruptcy, immediately upon his appointment, to petition the Court via "ex parte" proceedings for a redirection of mail for a period of three months. The Bill proposes that the granting of this petition is an administrative function, should be handled by the administrator and should be granted for a period of 30 days.

Such a routine matter should not involve the time and expense of an application to either a court or the administrator. This procedure could be avoided by providing that a trustee may advise the post office of the bankruptcy of a debtor and thereupon the post office should re-direct to the trustee mail addressed to the debtor.

The Canadian Institute of Chartered Accountants in their submission stated as follows on the "Realization of Property":

> "Section 191 provides penalties for trustees who do not adhere to regulations in respect of method of selling assets of the bankruptcy estate. In the past, trustees have been hampered by regulations that are rigid and leave no room for flexibility to deal with special circumstances. It is our understanding that the regulations that were imposed by the Superintendent were a direct result of abuses by some trustees of the tendering process. It is our view that this is wrong, that the creditors suffer as a result of this procedure, and that the Superintendent should take a more positive approach with respect to the bidding process. Our suggestion is that bidders should not be permitted to attend at the opening of bids but that the Superintendent or the administrator should be required to be there unless circumstances indicate that it is unnecessary. We are convinced this would have a beneficial effect on the total realization for the estate if this method were followed, and would satisfy the public with respect to the tendering process."

The Bill provides that a creditor may request the trustee to continue or institute a proceeding that in his opinion would benefit the estate. If the trustee refuses or neglects to institute or continue such a proceeding, the creditor may obtain permission from the Court to institute or continue the proceeding in his own name and in the name of the administrator. These proceedings are instituted at the cost of the creditor. Any benefit derived from these proceedings belongs exclusively to the creditor and any other creditor who joined with him in the proceedings to the extent of their total claims and costs. Any surplus belongs to the estate and is payable to the administrator or where the administrator so directs to the trustee or debtor.

The proposed Bankruptcy Act stipulates that where a bankrupt resides more than 10 miles from the place of a meeting and is requested to attend a meeting other than the first meeting of creditors or a meeting of a board of inspectors, the trustee will pay the bankrupt reasonable expenses for attending the meeting. The trustee should only have the obligation to pay these expenses if there are funds available in the bankrupt estate.

The Bill carries on the tradition of the existing Bankruptcy Act where once a trustee has accepted an appointment as trustee in bankruptcy of a file, he must continue on that file until the administration is terminated. This provision may create difficulties where the trustee at a date subsequent to the commencement of the administration of a file determines that he has a conflict of interest. We, therefore, recommend that if a conflict of interest arises during the administration of a file that the trustee be permitted to step down provided that another trustee acceptable to the inspectors is prepared to act.

Recommendations

1. No application to a court or to the administrator should be required for a redirection of mail. The trustee without an order should be entitled to require the post office to redirect to the trustee mail addressed to the bankrupt for a period not exceeding three months from the date of the bankruptcy. A court order should be required if the trustee wishes the redirection of mail to be extended beyond the three month period.

2. We agree with the recommendation of the Canadian Institute of Chartered Accountants as it pertains to the realization of assets.

3. We are of the opinion that in a bankruptcy, any surplus funds should be remitted to the trustee on the file and not to the administrator and only paid to the debtor if all monies owing to creditors have been fully discharged.

INTERIM RECEIVER

Bill C-60 sets out the duties and responsibilities of Interim Receivers generally. The powers and duties of the Interim Receiver are as included in the present Bankruptcy Act. The Bill proposes to legislate under what circumstances the Interim Receiver's appointment is terminated and the time frame under which he is to prepare his final accounts for taxation.

The Bill provides that when a debtor files an arrangement a creditor may by "ex parte" petition request for the appointment of an Interim Receiver.

Recommendation

In our opinion an Interim Receiver should be appointed in the terms and conditions of a proposal as well as during the Notice of Intention period while the proposal is being formulated.

INVESTIGATION BY THE SUPERINTENDENT OF BANKRUPTCY

In 1966 the Bankruptcy Act was amended to give the Superintendent of Bankruptcy extensive investigative powers in connection with a bankruptcy with respect to the conduct, dealings and transactions of the bankrupt, the causes of his bankruptcy and the disposition of his property. Section 6(1) of the Bankruptcy Act. The Bill has broadened the investigate powers to cover offences in connection with any proceedings under Bill C-60 which would include commercial and consumer arrangements as well as bankruptcies. The investigation may also include offences committed before the institution of proceedings under the Act. Section 53(1).

The Bill gives the Superintendent powers of search and seizure which may seriously disrupt the maintenance of permanent master files of data by large financial institutions such as banks and trust companies. In this age of the computer, data relating to transactions involving many parties is maintained in permanent master files. Provision should be made for the Superintendent to obtain the information he requires without disrupting the permanent master file.

RECOMMENDATIONS

1. We concur with the extension of the investigatory powers of the Superintendent to include any offence committed in connection with proceedings initiated under the Bill whether or not the proceedings had in fact been commenced when the offence was committed.

2. Where information relating to the dealings and transactions of a person under investigation by the Superintendent is maintained in a permanent master file together with information relating to other parties, the Superintendent shall only be entitled to production of the source documents and the transcription of the data of such person stored in the permanent master file. The Superintendent shall not be entitled to remove from its usual location the permanent master file.

CONFLICT OF INTEREST

The Bill legislates situations under which accountants, solicitors, trustees and other professionals may not act in the event of a bankruptcy. The Canadian Institute of Chartered Accountants in their Brief, report that they understand the following regulation is proposed as it relates to conflict of interest:

> "A trustee while he is the trustee of an estate may act for or assist a secured creditor of the estate to assert any claim against the estate or to realize a security interest that he holds if he:
>
> (a) obtains an opinion of a solicitor not related to the secured creditor that the security interest is valid as against the estate, and
>
> (b) notifies the creditors or the inspectors of all the circumstances of his relationship with the secured creditor, his remuneration, and the opinion he has received in respect of the validity of the claim of security interest.
>
> A trustee may act for a secured creditor up to the date of the first meeting of creditors while complying with the foregoing paragraph of this regulation."

RECOMMENDATIONS

1. We agree with the recommendation of the Canadian Institute of Chartered Accountants that the foregoing should be incorporate into the new Bankruptcy Act in substitution for Section 30.

2. We are concerned with the strict codification of the definition of the meaning of a conflict of interest within the statute and accordingly are of the opinion that the question of conflict of interest should be dealt with under the rules of conflict of the respective professional bodies.

3. Consideration should also be given to formulating amendments to the Bill whereby trustees may act in two or more estates which are related, particularly where we are dealing with parent, subsidiary, associated and, related companies, and husband and wife.

4. A solicitor who has acted for a debtor in a particular matter should be entitled to continue to act in that matter if the trustee and the inspectors are of the opinion that it would be beneficial to the bankrupt estate. This would permit the estate to take advantage of the knowledge of the matter acquired by the solicitor.

ARRANGEMENTS FOR THE CONSUMER DEBTOR

Part X of the present Bankruptcy Act permits an insolvent person to apply for a consolidation order which would provide for payment of his debts in full within a period of three years. Such a consolidation order does not apply to:

(a) a judgment or debt in excess of $1,000 unless the creditor consents to come under the order

(b) a debt owing to a government, municipality or school district

(c) a debt secured by real estate

(d) a debt incurred by a trader or merchant in the ordinary course of business. Section 189 of the Bankruptcy Act.

These restrictions limit the usefulness of Part X. It is only in force in a province which has requested that it be declared in force in that province. These provinces are British Columbia, Alberta, Saskatchewan, Manitoba, Nova Scotia and Prince Edward Island.

Bill C-60 introduces more elaborate provisions to enable an insolvent consumer or wage-earner to satisfy his obligations to his creditors by paying them in full or in part. The Bill refers to these arrangements as "Arrangements by way of composition" (composition arrangement) and "Arrangements by way of Extension of Time" (extension arrangement). A consumer debtor is defined as an individual who is insolvent but does not include an individual who carries on business and has debts exceeding ten thousand dollars ($10,000) or such greater amount as may be prescribed by regulation. Section 63(1).

Arrangements are administered by the bankruptcy administrator with whom the debtor files a request. The administrator prepares a proposal for either a composition arrangement or an extension arrangement. Although never defined, a composition arrangement involves part payment on account of the debts and the release of the debtor from the balance of the debts admissible under the arrangement. Section 72. An extension agreement is intended to involve payment of the debts in full including interest as it accrues, over a period of time not exceeding three years.

Proceedings by creditors whose claims are admissible in the arrangement are stayed. In an extension arrangement no claim is admissible for a debt secured by:

(a) real property

(b) personal property if

  (i) less than two-thirds of the debt has been paid

  (ii) the security agreement was given less than 60 days prior to the date of the proposal, and

  (iii) the creditor elects not to participate in the arrangement (Section 78(1)).

In a composition arrangement no claim is admissible where the debt is secured by:

(a) real property

(b) personal property if

  (i) less than two-thirds of the debt has been paid, and

  (ii) the creditor elects not to participate.

A proposal for a composition agreement must be approved by a majority of the creditors voting at a meeting of creditors called by the administrator. No meeting of creditors is required for the approval of an extension arrangement. A copy of the proposal for an extension arrangement is mailed to all creditors and any objection is filed with the administrator. Any objecting creditor is entitled to have a hearing before the administrator who is then empowered to ratify or amend the proposal. Sections 75 and 76.

If no objections are filed the administrator is deemed to have ratified the proposal which then becomes an extension arrangement. Section 76(2) (3).

The administrator is required to assist the debtor to rehabilitate himself financially and to carry out his financial obligations (Section 80). An arrangement may be for a term not exceeding three years but the administrator has the right to extend the term for an additional year to four years. Section 87(1) (2).

The duties of the administrator with respect to consumer arrangements are quite extensive and time consuming. Your Committee is concerned that the benefit achieved will not justify the administrative costs involved. Many debtors have difficulty meeting their normal living expenses and with the best intentions will be unable to perform their obligations under a consumer arrangement. Unexpected problems such as medical expenses or the repair of an automobile may also cause the debtor to default on an arrangement.

The definition of "debtor" in Section 63(1) will cause problems. Is an individual who practises a profession deemed to carry on business? What about a debtor who has ceased to carry on business? After a request is filed there is no time limit within which an administrator must prepare a proposal. Section 65(1). Nevertheless proceedings by a creditor are stayed by the filing of a request for a proposal. Section 68, which creates the stay of proceedings is confusing since it provides all admissible claims are stayed upon the filing of a request but until the arrangement is proposed it is impossible to determine which type of secured claims are admissible.

The right of a creditor to object to the terms of an extension arrangement is very limited. The final decision as to whether or not the extension arrangement is reasonable is granted to the administrator who prepared it in the first instance. In the case of a composition all creditors, whether secured or unsecured, vote on the proposal as a class. A majority of the votes of the unsecured creditors have the power to approve a proposal against the wishes of secured creditors. Section 69(3)(5). There is no provision giving secured creditors any greater rights than unsecured creditors in an arrangement.

There is no mention in the Bill of what happens to the rights of creditors who hold security on real property. Since their claims are not admissible in an arrangement, proceedings by such creditors against the debtor are not stayed. Many creditors may take advantage of this loophole to avoid being subject to an arrangement by insisting on a mortgage on real property owned by the debtor whether or not there is any equity in it. Such a creditor could proceed to sue the debtor and garnishee his wages notwithstanding a request for an arrangement has been filed.

The administrator is given limited control over the assets of the debtor. He may arrange for a certificate of judgment or a writ of execution to be filed as a charge against property of the debtor. Section 84. He is also entitled to require the debtor to execute an assignment of his future wages as security for the performance of his obligations under an arrangement. Section 83(3).

Where a debtor is in default for *more* than three consecutive months, the arrangement is deemed to have been annulled. Section 88(3). This seems to mean that there must be at least four months consecutive default before an arrangement may be annulled. It would be possible for a debtor to make a payment, miss three monthly payments, make another payment and not have his arrangement annulled. This could lead to very serious abuse by debtors.

If an assignment is annulled the rights of creditors are revived. Section 88(4)(c). Does this mean that the portion of a debt which is released by Section 72 is reinstated?

Section 82 will greatly annoy the creditors. It provides that a creditor who is already suffering a loss must pay a fee to the administrator in order to ascertain the terms of an arrangement and how it is being performed.

RECOMMENDATIONS

1. A debtor entitled to make a consumer arrangement should not include a debtor with liabilities in excess of twenty thousand dollars ($20,000) or such other amount as may be prescribed excluding any debt secured by real property. Using the total amount of the liabilities of the debtor gives the most precise method of determining which debtor is entitled to make a consumer arrangement as opposed to a commercial arrangement.

2. The terms "extension arrangement" and "composition arrangement" should be defined in order to avoid any doubt as to the meaning of the terms.

3. The period of time which may elapse between the filing of a request for a proposal and the filing of a proposal or the rejection of the request should be limited to ten days.

4. A creditor whose debt is secured by real property should be required by the administrator to value his security. The difference between the debt and the value of the security should constitute a claim admissible in an arrangement. If a creditor does not value his security he shall be deemed to be fully secured.

5. Proceedings by all creditors to exercise a remedy against the debtor or his property should be stayed by the filing of a request for a proposal, save and except proceedings by a creditor to realize upon real property of the debtor subject to his security.

6. A creditor should be given the right to vote by voting letter on both an extension arrangement and composition arrangement. If a majority of the creditors do not approve an extension arrangement it should be held to be rejected. An extension arrangement is an offer of payment to the creditors which permits the debtor to continue using his assets. This privilege should only be accorded to a debtor if his creditors consent thereto.

7. Voting by creditors should be simplified by basing a creditor's votes on the dollar value of his claim.

8. Secured creditors whose claims are admissible in an arrangement should be given the right to realize upon property of the debtor subject to their security if there is one month's default in the performance by the debtor of his obligations under an arrangement.

9. An arrangement should be annulled if there is three months default in an arrangement, whether consecutive or not, unless such default is waived by the administrator.

10. If a proposal is annulled the debtor should be deemed to be automatically bankrupt. This would avoid any harassment of the debtor by his creditors and the administrative cost of separate bankruptcy proceedings. Any money deposited with an administrator on hand when an arrangement is annulled should be paid to the

creditors of the debtor by the trustee in bankruptcy of the debtor. For ease of administrative convenience the administrator should act as trustee in bankruptcy where a consumer arrangement has been annulled.

11. The creditor should not be required to pay a fee to the administrator on any reasonable request by him for information concerning an arrangement and the performance by the debtor of his obligations thereunder.

12. Creditors should be required to file claims with the administrator. The provisions in the Bill waiving such a filing if the debt is acknowledged by the administrator could lead to serious abuse by collusion between the debtor and a creditor.

COMMERCIAL ARRANGEMENTS

(a) Terms

In the present Bankruptcy Act, the term "proposal" is used to cover an offer of compromise to the creditors both before and after it is accepted by the creditors and both before and after it is approved by the court. No distinction is made between a proposal that is made before a bankruptcy and a proposal that is made after the bankruptcy of the debtor. The use of the term "proposal" as being applicable to the different stages of the proceedings has not created any difficulties in understanding and practise. Bill C-60 uses different terms depending on the stage of the proceedings. It uses the terms "proposal" for an "arrangement", "commercial arrangement" and "preventive arrangement". The use of these different terms depending on the stage and type of proceeding does not add clarity to the legislation and they are not used consistently throughout Bill C-60.

Recommendation

The only term which should be used under part IV of Bill C-60 is the term "commercial arrangement". It should have a meaning equivalent to the meaning of "proposal" under the present Bankruptcy Act. The use of the adjective "commercial" will enable the proceeding to be distinguished from an arrangement by a consumer debtor.

(b) Who is affected by an arrangement

Section 91(2) of Bill C-60 stipulates that a creditor is deemed to be affected by an arrangement only where his interest or rights are materially and adversely affected thereby. It is possible that a creditor may have a secured claim against the debtor and not be subject to the arrangement. Also the same creditor may have an unsecured claim which would be affected by the arrangement.

Recommendations

1. Section 91(2) of Bill C-60 should be amended in order to provide that a creditor is deemed to be affected by an arrangement only if his claim or any part thereof, is materially or adversely affected by the arrangement.

2. Recognition should be given to the fact that one creditor with several classes of claims may be affected by an arrangement in respect of one class of claim and may not be affected by an arrangement in respect of another class of claim.

3. Section 91 (3) of Bill C-60 should permit the court to determine to what extent a creditor may be affected by an arrangement.

(c) Who may make a commercial arrangement

Under the present Bankruptcy Act, only the debtor, whether bankrupt or not, may make a proposal. Section 93 (3) of Bill C-60 enlarges the category of persons who are entitled to make a commercial arrangement in respect of a bankrupt and a debtor. These persons include the trustee in bankruptcy, the liquidator of the debtor, a creditor of a bankrupt and a trustee under a trust indenture if the corporation is a bankrupt. The intent of Bill C-60 is admirable but no provisions are set up to enable such parties to take control of and manage the affairs of the debtor. What happens if the debtor is unwilling or unable to carry out the commercial arrangement proposed by a creditor? Who is entitled to the shares of a corporation if the commercial arrangement is made by the trustee in bankruptcy? After the commercial arrangement is approved by the court, who is entitled to elect the board of directors of a corporation?

Recommendations

1. The provisions of Bill C-60 which allow persons other than the debtor to make a commercial arrangement for the debtor will only be viable if powers are given to such parties to control the property and affairs of the debtor.

2. If a commercial arrangement is made on behalf of the debtor by someone else pursuant to the provisions of Section 93(3) of Bill C-60:

(a) if the debtor is a corporation the trustee named in the commercial arrangement should be entitled to vote the shares of the corporation at all meetings of creditors of the corporation held during the period in which the arrangement is outstanding. Thus the trustee would be entitled to elect the board of directors of the corporation.

(b) if the debtor is an individual the trustee named in the commercial arrangement should be appointed attorney for the debtor with complete powers to manage the business affairs of the debtor and to control the non-exempt property of the debtor during the period in which the arrangement is outstanding.

(d) Notice of Intention

Section 94 of Bill C-60 allows a debtor who intends to make a commercial arrangement with his creditors to file a notice of his intention to make such an arrangement. This is a new and useful procedure that is not available under the present Bankruptcy Act. It will give the debtor an opportunity to formulate a realistic and practical commercial arrangement.

It is intended that the filing of a notice of intention will stay proceedings by creditors of the debtor. Section 94(2). The language of Bill C-60 does not accomplish this. The combined effect of Sections 94 (2), 95 (4) and 103 is that creditors who are affected by an arrangement have their proceedings stayed. However, at the time a notice of intention is filed, it is impossible to determine which creditors will be affected by the arrangement since the terms of the arrangement will not have been settled.

The filing of a notice of intention to make a commercial arrangement is an acknowledgment of insolvency on the part of the debtor. In order to prevent an unscrupulous debtor from taking advantage of this procedure by

improperly disposing of his assets, it is desirable that an interim receiver of the assets of the debtor should be appointed by the court at the same time as a notice of intention is filed. It has been suggested that this procedure might impose a heavy burden on the debtor since he would be required to pay the costs of the interim receiver. At the present time, most orders appointing an interim receiver given the interim receiver the power to take possession of the assets of the debtor and to control his receipts and disbursements. Performing these functions, which may involve twenty four hour protection of several premises, may result in heavy costs. This could be avoided be giving the court flexibility in the powers it would grant to the interim receiver.

RECOMMENDATIONS

1. Section 94 (2) should be amended to provide that where a notice of intention has been filed with respect to a debtor no creditor of the debtor may exercise a remedy against the debtor or his property or institute or continue a proceeding for the recovery of a claim without leave of the court.

2. The debtor must obtain leave of the court to file a notice of intention to make a commercial arrangement and such leave should not be granted unless a licensed trustee is appointed interim receiver of the property and assets of the debtor.

3. Immediately after the filing of a proposal, the trustee named in the proposal should be appointed interim receiver of the property of the debtor with such powers as may be set out in the proposal or as the court may determine.

4. The court could authorize the interim receiver to perform one or more of the following functions depending upon the circumstances:

(i) to take possession of the property and assets of the debtor;

(ii) to control the receipts and disbursements of the debtor;

(iii) to manage the business of the debtor;

(iv) to inspect the books and records of the debtor;

(v) to make an inventory of the property and assets of the debtor;

(vi) to borrow for the purpose of financing the business of the debtor and to pledge the assets of the debtor as security for such loans;

(vii) to receive daily the cash receipts of the business of the debtor and to control the disbursements of the debtor.

5. The trustee named in the notice of intention or in the proposal should be required to stipulate which of the above mentioned powers would provide the creditors with sufficient protection without undue expense.

(e) ACCEPTANCE BY CREDITORS

Under the present Bankruptcy Act a proposal is accepted by the creditors if it is accepted by a majority in number of the creditors voting and by the creditors with 75% of the total of the claims of creditors voting on the proposal. Section 104 (3) of Bill C-60 provides that a proposal is accepted by the unsecured creditors if the majority of votes cast by the unsecured creditors, regardless of class, are in favour of a proposal. This could result in an unjust and unfair treatment of small creditors. Creditors with claims of large amounts could accept a commercial arrangement which provided for lesser benefits to the small creditors. It would be preferable to stipulate that a proposal could only be accepted by the unsecured creditors if each sub-class of creditors affected by the proposal accepts the proposal. Section 104 (4) of Bill C-60 states that a proposal is accepted by a class of secured creditors where 75% of the votes cast by that class of creditor is in favour of the acceptance of the proposal.

The present provisions of the Bankruptcy Act give too great a control over the acceptance of a proposal to the larger creditors. Creditors with 26% of the total amount of the claims of creditors voting on a proposal are given the power to veto a proposal. This problem is continued by the provisions of Bill C-60 relating to the acceptance of a proposal by a class of secured creditors. On the other hand requiring only a majority of votes by unsecured creditors for the acceptance of a proposal appears to be retreating too far in the opposite direction. A proper balance should be maintained between the rights of creditors who are in favour of the acceptance of a commercial arrangement and those who oppose it.

A commercial arrangement is a plan for the reorganization of an insolvent person. It is an attempt to permit the financial survival of the debtor. In most situations the terms of a commercial arrangement are interdependent and payments to one class or sub-class of creditors are dependent on each class or sub-class of creditors accepting the commercial arrangement.

RECOMMENDATIONS

1. Acceptance of a commercial arrangement by any class or sub-class of creditors should require an affirmative vote equal to 60% of the votes cast.

2. If one class or sub-class of creditors does not vote in favour of acceptance of a proposal the proposal should be held to be not to have been accepted by the creditors.

(f) DEFINITION OF CLASSES OF CREDITORS

Under the present Bankruptcy Act proposals only affect the rights of unsecured creditors and they are generally treated as one class. No power is given to affect the rights of secured creditors. Bill C-60 clearly attempts to rectify the situation and Section 96 (1) provides that a proposal may affect various classes of creditors which may include secured creditors. This is very desirable particularly with respect to insolvencies in the construction industry when mechanics' liens are filed. Unfortunately, the definition of what constitutes a class as set out in Section 284 (3) is very confusing. It refers to an order of priority for secured creditors as set out in the Act. Bill C-60 does not and should not contain any provisions determining the priority of secured creditors. These priorities should be determined by provincial law.

RECOMMENDATIONS

1. Unsecured creditors whose claims rank on the same level in the order of priority set out in Section 254 of Bill C-60 should constitute a separate class.

2. Secured creditors whose claims are payable out of the same property pro rata on an equal basis should constitute a separate class.

3. For the purposes of a commercial arrangement, a class of creditors may be divided into a sub-class based on the amount of the claim or the type of claim or creditor.

4. A commercial arrangement may stipulate that the classes and sub-classes of creditors may be affected differently.

(g) (i) CHAIRMAN OF MEETING OF CREDITORS

At the present time the Official Receiver, an employee of the Superintendent of Bankruptcy, acts as chairman at the first meeting of creditors in a bankruptcy. The trustee acts as chairman of the meeting of creditors to consider a proposal. The practise of the trustee chairing the meeting of creditors to consider a proposal is undesirable. In most cases, the trustee has been involved in the formulation of the terms of the proposal. He is required to investigate the affairs of the debtor and report to the creditors the results of his investigation. The creditors expect the trustee to make a recommendation whether or not a proposal should be accepted. The duties imposed upon him by the present Bankruptcy Act which are enlarged by Bill C-60 do not permit him to maintain an impartial role at the meeting of creditors. The many contentious issues which arise at meeting of creditors to consider a proposal should be decided by a person who is and appears to be impartial. This role can only be effectively performed by the bankruptcy administrator.

RECOMMENDATION

Bill C-60 should retain Section 279 (1) which stipulates that at every meeting of creditors, the administrator or his nominee, shall act as chairman.

(ii) Voting

Under the present Bankruptcy Act, a creditor has the right to vote on a proposal by voting letter. This saves the creditors the time and expense of attending the meeting of creditors. There is no mention of the use of a voting letter in Bill C-60. It has been suggested that the right to vote by voting letter is retained by the provision in the Bill giving a creditor the right to vote by proxy. Section 286 (1). This is a cumbersome method which could easily be avoided by the simple and direct method of using a voting letter.

RECOMMENDATIONS

1. The right of a creditor to vote by voting letter on a commercial arrangement should be retained.

2. The trustee should be required to mail a voting letter to each creditor with the notice of the meeting of creditors.

(h) INSPECTORS

Under the present Bankruptcy Act the creditors have the right to appoint inspectors to supervise the performance of the obligations of the debtor under a proposal. This power has proven very useful for both the creditors and the trustee. The creditors have the opportunity of being much better informed on the progress of the proposal. Unfortunately, Bill C-60 has omitted any reference to inspectors being appointed for a commercial arrangement.

RECOMMENDATIONS

1. At the first meeting of creditors held to consider the terms of a commercial arrangement, the creditors shall be entitled to elect inspectors for the purpose of advising the trustee acting in the commercial arrangement.

2. The inspectors should be entitled to all the powers of inspectors in a bankruptcy insofar as they may be applicable to the commercial arrangement unless such powers are restricted or enlarged by the terms of the commercial arrangement.

(i) EFFECT ON SECURITY AGREEMENTS

Many security agreements provide that repayment of the loan is accelerated if the debtor makes a proposal under the Bankruptcy Act.

RECOMMENDATION

Notwithstanding the terms of a security agreement, the court should be granted the power to determine whether the filing of a proposal should accelerate repayment of a loan or constitute default under the terms of a security agreement. This would be very desirable if the constitutional problems created could be resolved.

(j) AMENDMENT TO COMMERCIAL ARRANGEMENTS

The present Bankruptcy Act and Bill C-60 give no guidance as to when and how a proposal or commercial arrangement may be amended. Neither of them have any provisions setting out the effect of an amendment.

RECOMMENDATION

Specific references in Bill C-60 should deal with the right to amend a commercial arrangement and the problems arising from an amendment. Such provisions should include the following:

(a) If a proposal is amended prior to the mailing of notices of the first meeting of creditors, only the amended proposal should be mailed to the creditors.

(b) An amended proposal, whether amended before or after the meeting of creditors, or before or after the approval of the proposal by the Court, should be deemed to have taken effect as of the date of the filing of the original proposal. This result would contrast with the consequence of a second proposal being filed by the debtor. A second proposal would only take effect as of the date it was filed.

(c) A proposal may be amended and voted upon at a meeting of creditors without further notice to the creditors if the amended proposal provides all the creditors affected by it with benefits equal to or better than those provided by the original proposal.

(k) DEFAULT IN PERFORMANCE OF TERMS OF COMMERCIAL ARRANGEMENTS

Section 43 (1) of the present Bankruptcy Act provides that if there is default in the performance of the provisions of a proposal, the court may annul the proposal. Upon such an order being made, the debtor is deemed to have made an assignment in bankruptcy on the date of the annulment order. This date becomes the date of bankruptcy for the purposes of determining whether or not fraudulent preferences and other fraudulent transactions may be attacked.

Section 124 of Bill C-60 continues the present practise by providing that where an arrangement is annulled, the debtor is deemed to have filed a bankruptcy petition on the date of the annulment order. The trustee in bankruptcy may be precluded from attacking the improper transactions which took place prior to the filing of the proposal because of the lapse of time between the date of the proposal and the date of the annulment order.

RECOMMENDATION

For the purpose of attacking improper transactions such as fraudulent preferences after the proposal has been annulled, the date of bankruptcy should be deemed to be the date of the filing of the notice of intention or of the proposal.

SECURED CREDITORS

(a) PRIORITY OF WAGE EARNERS

A very significant aspect of Bill C-60 is the treatment accorded to secured creditors vis-à-vis wage earners. A secured creditor is a person holding an interest or charge upon property as security for the payment of a debt. Section 238 (2) provides that a claim for wages up to $2,000.00 has priority to all other secured creditors. Under the present Bankruptcy Act claims for arrears of wages rank as preferred creditors to a maximum amount of $500.00. Preferred creditors rank behind secured creditors. Bill C-60 contains procedures whereby the trustee in bankruptcy may borrow funds to pay wage claims and give security on the assets of the bankrupt for such borrowing in priority over all existing security covering such assets. Sections 238(4), (5), (6) and (7). A secured creditor who is affected by the borrowings of the trustee to pay wages is entitled to be subrogated to the preference of the wage earner against other assets of the bankrupt and to the wage earner's rights against the directors if the bankrupt is a corporation.

After the bankruptcy has occurred, the employees of a bankrupt company should be promptly paid the wages they have earned. Bill C-60 attempts to accomplish this but at the expense of a serious disruption of the commercial lending system. The ability of the borrower to obtain credit to finance the ongoing operations of his business may be seriously hampered since secured financing will be rendered uncertain. In particular, labour intensive industries may find it extremely difficult to borrow funds. A marginal borrower may be unable to satisfy a lender that he has sufficient equity in his assets to support a loan after provision is made for possible unpaid wages.

The granting of priority does not assure the employees of the wage protection that is intended. Sophisticated lenders may stipulate that their loans be made to an associated holding company which owns all the valuable assets leaving no assets in the operating company available to pay arrears of wages. Alternatively, the assets of a bankrupt may be of such a nature that they are not readily convertible into cash and a lender may be very reluctant to loan money against them. In addition, arrangements to borrow sufficient funds to pay the arrears of wages may take an extended period of time while the lender satisfies itself as to the value of the assets.

The borrowing by the trustee creates administrative problems. Many disputes may arise between the trustee, the lender and the secured creditors because there are no specific details in Bill C-60 setting out the type of security interest which may be given to the lender or the terms applicable thereto. The final allocation of any moneys borrowed against assets covered by security held by several secured creditors will be very complicated.

Since the secured position of the wage earner only arises when a bankruptcy occurs, a secured creditor who feels insecure may attempt to realize upon his security very quickly before bankruptcy proceedings are commenced. This may result in the premature termination of an ongoing business. It also may result in a lower recovery from the assets and a lesser amount available for distribution to other creditors.

RECOMMENDATION

It is the opinion of your Committee that the provisions of Bill C-60 providing that a claim for wages up to $2,000.00 has priority over all other secured creditors should be struck out. Consideration should be given to the creation of a government administered fund under the authority of the Bankruptcy Act out of which unpaid wages of employees could be paid forthwith upon the bankruptcy. The claim for unpaid wages would cover wages in arrears to a limit of $2,000.00 and should not include vacation pay, severance pay and fringe benefits. Contributions to this fund could be received from employers and employees. The trustee in bankruptcy would ascertain complete details of the unpaid wages, provide the necessary information to the officials administering the fund and distribute the payments to the unpaid employees. The fund could be subrogated to the rights of the employees and rank as an unsecured creditor in the distribution of the assets of the bankrupt.

The representatives of the Department of Consumer and Corporate Affairs who appeared before us estimated that the annual amount to be disbursed by such a fund throughout Canada would not likely exceed $4,000,000.00 if severance pay is not included. Since there are over 9,000,000 employees in the work force in Canada, the amount of each contribution would be relatively modest.

The representatives of the Department who appeared before us stated that a fund of the nature contemplated would provide the employees with the best possible protection. The creation of an insurance fund would assure payment of wages in arrears to a maximum of $2,000.00 whereas the method of priority proposed under the Bill gives no such assurance.

(b) STAY OF PROCEEDINGS

Under the present Bankruptcy Act, proceedings by secured creditors are not automatically stayed by a bankruptcy. The trustee of the bankrupt estate has the power to apply to the court for an order staying proceedings by a secured creditor for a period not exceeding six months under Section 49 of the present Bankruptcy Act.

Bill C-60 completely reverses the position of the trustee and secured creditor. The filing of a petition for bankruptcy, a notice of intention to file a proposal, or a proposal stays proceedings by a secured creditor. Sections 94(1), 95(4) and 138.

In addition, Section 238(3) provides that after a proposal or petition for bankruptcy is filed, a secured creditor shall not realize or deal with the property of the debtor for a period of ten days after the date of the proposal or the date a bankruptcy order is made. A secured creditor is not entitled to realize upon the property covered by his secu-

rity until both a proof of claim is filed with the trustee and the trustee has not exercised his right to redeem the property. Section 240(1). The trustee has thirty days from the date of the filing of the proof of claim to exercise his right to redeem. Section 241(2). These restrictions to not apply if the property is perishable or likely to depreciate in value. Section 240(5). Also, the court may postpone the right of realization by a secured creditor if the postponement does not cause hardship and no payment of principal or interest is in arrears for more than six months. Section 242(1).

The provisions of Bill C-60 staying proceedings by secured creditors without leave of the court place the burden on the secured creditor to satisfy the court that he is being prejudiced by the stay of proceedings. This reverses the present law which places upon the trustee the burden of proving that the secured creditor will not be prejudiced by the stay of proceedings. A problem created by the terms of Bill C-60 effecting such a stay results from the fact that secured creditors such as mechanics' lien claimants are subject to rigid time deadlines to perfect their security. Under Ontario law, if a mechanics' lien is not filed within 37 days after the last work was done, the right to a mechanics' lien is lost. Other filing deadlines apply to debentures chattel mortgages, conditional sale contracts and assignments of book debts. Section 402 of Bill C-60 attempts to rectify this problem by removing the period during which the rights of a creditor are stayed from any limitation period deadline. This would be completely ineffective if a creditor had a right to file a mechanics' lien and the trustee in bankruptcy sold the property before the mechanics' lien was filed.

RECOMMENDATION

All creditors should be permitted to take any steps necessary to perfect their security such as registration or giving notice to third parties, notwithstanding the fact that bankruptcy proceedings have been commenced. This does not mean that there would be no restrictions with respect to their realization upon the assets of the debtor subject to their security.

(c) REALIZATION BY SECURED CREDITORS

Under the present Bankruptcy Act, the trustee in bankruptcy has very little power or control over the realization by a secured creditor on the assets of a bankrupt subject to his security and the costs incurred. Bill C-60 attempts to rectify this problem. Under it the trustee may require the property to be sold on terms and conditions satisfactory to the secured creditor and the trustee or as the court may direct. Section 240(3). A secured creditor may require a trustee to elect whether he will exercise his power to redeem the security interest or require the property to be transferred. Section 241(1). The trustee has thirty days to reply to the above notice from the secured creditor. Section 241(2). Even if the trustee does not receive such a notice, he has the right to redeem the security interest or to require the property to be realized. Section 241(3). Upon giving notice of intention to redeem or to require the property to be realized, within three months after the service of the notice of election the trustee must pay to the secured creditor the amount of the secured debt or the value of the property as set out in the proof of claim or the net proceeds of realization, whichever is the lesser. If the trustee fails to redeem the property, he loses his right to redeem or to require the property to be realized, the interest of the trustee in the property vests in the creditor, the debt owed to the secured creditor is reduced by the amount of the valuation in the proof of claim and the trustee loses his right to inspect the property. Section 241(5).

The thirty day stay upon realization will create many practical problems. Who will be responsible for protecting the assets? Who will be responsible for payment of rent for the premises if the assets are located on leased premises? Who will collect the accounts receivable? Will the trustee or the secured creditor be entitled to carry on the business of the bankrupt? If so, who will finance the continued operation of the business of the bankrupt?

RECOMMENDATIONS

1. The stay of proceedings imposed upon the realization by a secured creditor should be modified. If permitted by the security instrument, the secured creditor should be allowed to take possession of the property of the bankrupt subject to his security, to carry on the business of the bankrupt and to collect the accounts receivable of the bankrupt. Upon the making of a bankruptcy order, the right of the secured creditor to realize or sell the property of the bankrupt out of the ordinary course of business should be stayed for ten days from the date the secured creditor files with the trustee a proof of claim setting out the following information if applicable or for ten days after the first meeting of creditors, whichever is the later:

(a) The total balance owing;
(b) The amount of any payments in arrears;
(c) The security agreement;
(d) The court order appointing a receiver;
(e) The instrument appointing an agent or receiver;
(f) All acts taken to date and expenses incurred;
(g) The method of sale proposed by the secured creditor;
(h) An estimate of the value of the property;
(i) Details of the property in the possession of the secured creditor.

2. Such a proof of claim should be filed by the secured creditor with the trustee within ten days after receiving a notice from the trustee requiring the same. If the secured creditor does not file such a claim, the secured creditor should be required to deliver all the property of the bankrupt in his possession to the trustee.

3. Upon the filing of the notice of an intention to make a proposal, a proposal or a petition for a bankruptcy order, any party, including an interim receiver, should be entitled to apply to the court for a stay of the proceedings by a secured creditor. Such an order should only be granted if the postponement does not cause hardship to the secured creditor and no payment of principal or interest is delayed for more than six months. A similar power is given to the trustee in bankruptcy in Section 242(1).

4. In addition, the court should be given the power to control the method of realization by a secured creditor and the costs incurred in the realization. The costs and expenses of realization by a secured creditor should be subject to taxation by the court. The secured creditor should be required to pay to the trustee any surplus remaining within fifteen days after the accounts have been taxed.

In these recommendations, your Committee has attempted to maintain an even balance between the right of a secured creditor to realize upon the assets covered by the security agreement for which he bargained when he loaned the money to the bankrupt and the need of the

trustee in bankruptcy to have a reasonable time to assess the situation in order to obtain the maximum recovery for unsecured creditors.

EXEMPT PROPERTY

Section 47 of the present Bankruptcy Act stipulates that property of the bankrupt which is exempt from seizure under the laws of the province within which the property is situated and within which the bankrupt resides does not vest in the trustee in bankruptcy for distribution among the creditors. The nature and value of the assets which are exempt from execution vary from province to province. Most provinces have stipulated the type of tangible assets which are exempt up to a maximum value. In addition, intangible benefits and rights such as pension benefits, armed service allowances, family allowances, unemployment insurance and Mothers' allowances are exempt from seizure. No maximum limitation is imposed on these benefits.

Most provinces provide that insurance policies are exempt if the beneficiary is either the spouse or child of the insured. The purpose of this is to encourage a man to maintain life insurance for the protection of his family.

Section 145 of Bill C-60 states that all the property of the bankrupt at the date of the bankruptcy order vests in the trustee except:

(a) real and personal property exempt from seizure under provincial law

(b) rights under an insurance policy if an amount equal to the cash surrender value thereof is paid to the trustee

(c) benefits payable to a disabled person under an insurance policy, a retirement savings plan or a pension fund or plan.

Bill C-60 also establishes a uniform exemption across Canada of three thousand dollars ($3,000) in respect of the value of assets which will not vest in the trustee in bankruptcy for distribution among the creditors. This is effected by an awkward method. A bankrupt who retains exempt property with a value in excess of three thousand dollars ($3,000) will not be discharged from his debts. Section 150. This low limit on exempt assets is in accordance with the general philosophy of Bill C-60, the thrust of which directs and encourages insolvent persons to make an arrangement for payment to their creditors rather than use the last resort solution of bankruptcy.

The definition of property in Section 2 of Bill C-60 is all encompassing and includes intangible rights such as pension benefits, family allowances and wages. To apply the maximum exemption to the total value of both tangible and intangible assets belonging to the debtor at the date of bankruptcy would create a very onerous result. The ability of a bankrupt to re-establish himself will be seriously hampered.

The definition of exempt assets in Bill C-60 with regard to insurance policies is more restrictive than the present laws of most provinces which provide that insurance policies are exempt from seizure if the beneficiary is the spouse or child of the insured. It is also more severe with regard to pension and other types of benefits since only benefits payable to disabled persons are exempt. Your Committee is of the opinion that these provisions of Bill C-60 are regressive and the present policy of encouraging a person to maintain protection for his family and to make satisfactory provision for his old age should be continued.

RECOMMENDATIONS

1. Property that does not vest in the trustee for distribution among the creditors of the bankrupt should include all property which is exempt from seizure under federal and provincial law.

2. No maximum limit should be imposed upon the value of such exempt property.

3. Uniformity of exemption across the country is not necessary.

UNENFORCEABILITY AND REVIEW OF TRANSFERS

(a) DEFINITION OF INSOLVENCY

Under the present Bankruptcy Act the term "insolvent" by itself is not defined. In Section 2 (j) of the present Bankruptcy Act the term "insolvent person" is defined:

> as a person who is not a bankrupt and who resides or carries on business in Canada, whose liabilities amount to $1,000.00, and
>
> (i) who for any reason is unable to meet his obligations as they generally become due, or
>
> (ii) who has ceased paying his current obligations in the ordinary course of business as they generally become due, or
>
> (iii) the aggregate of whose property is not, at a fair valuation, sufficient, or if disposed of at a fairly conducted sale under legal process would not be sufficient to enable payment of all his obligations, due and accruing due.

Section 5 of Bill C-60 has a very limited definition of "insolvent". It provides that a person is insolvent where the property of the person, if it were realized at a fair valuation, would be insufficient to pay all the certain and liquidated debts of that person whether or not the debts are due. Section 6 of Bill C-60 contains provisions as to when a person is deemed to have ceased to pay his debts and also when a person is presumed to have ceased to pay his debts generally as they become due. However, the phrase "ceased to pay his debts generally as they fall due" is never used in Bill C-60. In Sections 140 (3)(b) and 165 the converse term "paying his debts generally as they become due" is used. Section 7 (1) provides that a person is unable to pay his debts if he is unable to pay all his debts that are certain, liquidated and payable. Section 7 (2) provides that a person who has ceased to pay his debts generally as they become due is deemed to be unable to pay his debts. These provisions of Bill C-60 are very cumbersome. A much simpler approach to the problem would be to use the term "insolvent" in the sections of Bill C-60 where the terms "insolvent", "unable to pay his debts" or "cease to pay his debts generally as they fall due" are used. In the following sections the phrase "insolvent or unable to pay his debts" could be condensed to insolvent if there was an enlarged definition of insolvent: Sections 128, 154 (c), 158 (1)(b), 159 (2)(a) and 164 (1).

RECOMMENDATION

The definition of "insolvent" should be enlarged to read as follows:

> "A person is insolvent if:
>
> (a) a fair realizable value of his property would be insufficient to pay all his certain and liquidated debts whether due or not, or
>
> (b) if he is unable to pay all his debts which are certain, liquidated and payable, or

(c) if he has ceased to pay his debts generally as they become due."

(b) Definition of gift

In Bill C-60 the definition of gift in Section 2 includes a designation of a beneficiary under an insurance contract *by way of gift*. This creates a circuitous definition.

Recommendation

The definition should be changed to read:

"(b) a gratuitous designation of a beneficiary under an insurance contract."

(c) Use of term unenforceable

In almost every section of Bill C-60 relating to the right of a trustee to set aside transactions prior to bankrupty, the transaction is stated to be "unenforceable". The term "unenforceable" is not defined in Bill C-60. It is a new term which has not been used in the present Bankruptcy Act. In Bill C-60 it is used in situations where the trustee would be entitled to recover assets improperly transferred away by the bankrupt. The normal meaning of the word does not give the trustee any power to compel repayment or reconveyance of an asset. It only permits the trustee to defend any attempt by a third party to enforce a claim against assets in th possession or control of the trustee. The present Bankruptcy Act uses the term "void against the trustee". This term has traditionally been interpreted as giving the trustee the right to recover the transferred assets from the person who received it.

Recommendation

The word "invalid" should be substituted for the word "unenforceable". It should also be used in Section 155 (5) of Bill C-60 which uses the term "void" with a relation to reviewable transactions.

(d) Right of trustee to rely on provincial legislation avoiding transactions

At the present time, the courts of various provinces have handed down conflicting decisions as to whether or not a trustee in bankruptcy is entitled to rely on provincial legislation setting aside fraudulent preferences. The courts have unanimously upheld the right of the trustee in bankruptcy to rely on provincial laws setting aside fraudulent conveyances made with the intent to defeat and defraud creditors. Usually the most significant difference between the provincial law and the federal Bankrupty Act is the time within which a transaction must take place prior to the date of bankruptcy in order to be subject to attack. For example, under Section 73 of the present Bankruptcy Act, a fraudulent preference in favour of a creditor who dealt at arms length with the bankrupt is only subject to attack if it took place within three months prior to the date of bankruptcy. Under Article 1036 of the Civil Code of Quebec, there is no time limit within which a fraudulent preference must have taken place prior to the date of bankruptcy. It is only necessary for the trustee to prove that the payment was made at a time when the debtor was insolvent. The provincial laws and the federal Bankruptcy Act also have certain different requirements with respect to the onus of proof.

Section 155 (1) (b) of Bill C-60 provides that a trustee may review a transfer between parties dealing at arm's length if it took place within one year of the date of bankruptcy and had the intent known to both parties, to impede, obstruct, delay or defraud a creditor. If the effect of the reviewable transaction was to impede, obstruct, delay or defraud the creditors or any of them, the court may make an order declaring the transfer void and restoring each party to the transfer insofar as possible to the state he was in immediately prior to the transfer. Section 155 (5).

There is a very real possibility that Sections 155 (1) and (5) could be interpreted so as to preclude the trustee from relying on the fraudulent conveyance statute of any province for the purpose of setting aside fraudulent conveyances on the ground that the Bankruptcy Act supersedes provincial legislation. These sub-sections are restricted in that they only apply to transactions which occurred within one year of the filing of the bankruptcy petition. Under most provincial fraudulent conveyance acts, transactions occurring within six years prior to the date of bankruptcy may be attacked.

Recommendation

A specific section should be included in Bill C-60 to provide that a trustee in bankruptcy is entitled to rely on provincial legislation to set aside fraudulent conveyances, fraudulent preferences and any other transactions which are invalid as against creditors under provincial law. Creditors are entitled to the maximum amount of protection available.

(e) Security for pre-existing debt

Section 161 (1) of Bill C-60 introduces a completely new provision which provides that a transfer by way of a security interest is unenforceable against the trustee unless the transfer was made within thirty days after the debt was incurred, or within ten days after the property was acquired by the debtor and pursuant to an agreement entered into at the time the debt was incurred. This section prevents a creditor from taking security for a pre-existing debt if the debtor is insolvent at the date of the granting of the security.

No time limit is established within which a bankruptcy petition must be filed. Security taken many years before a bankruptcy may be set aside if the debtor was insolvent at the time such security was given and remained insolvent up to the date of bankruptcy. A transfer could be set aside if there was a bona fide delay in the execution of the security documents or if the security document was executed prior to the date the debt was incurred. It would set aside a conventional building mortgage when the mortgage is signed and registered before the money is advanced.

Recommendation

Section 161 (1) should be deleted since the provisions relating to the avoidance of fraudulent preferences are sufficient to protect creditors.

(f) Validity of assignments of book debts and other security instruments

Section 72 of the present Bankruptcy Act provides that an assignment of book debts is void as against the trustee as regards any book debts that have not been paid at the date of bankruptcy unless it is registered in accordance with provincial law. Section 166 (1) of Bill C-60 varies this and stipulates that an assignment of book debts is unenforceable unless the assignment is registered under a statute that provides for perfection of such an assignment by registration.

The term "perfection" is taken from the Uniform Commercial Code of the United States and the Personal Prop-

erty Security Act of Ontario which is not yet in force. It is not applicable to most provincial statutes requiring registration of assignments of book debts.

Section 169 of Bill C-60 provides for the purposes of Sections 154 to 168 that where any acts are required by law to make a transfer effective as against third parties and when such acts are not performed within thirty days after the transfer, the transfer is deemed to have been made on the date the last act required was performed. The transfer is deemed to have been make immediately prior to the filing of the petition if every act was not performed prior to the bankruptcy petition.

A problem arises with regard to assignments of book debts. Under the laws of most provinces, registration of an assignment of book debts makes it valid as against a trustee in bankruptcy and the creditors of the assignor. However, to make an assignment of book debts effective as against subsequent assignees of the book debts or a third party demand issued by Revenue Canada it is necessary to give notice to the debtors of the assignor. In order to permit the normal business operations of the borrower most lenders taking the assignment of book debts as security for a loan do not give notice to the debtors of the assignor at the time of the granting of the assignment. Notice is given when the borrower defaults. The lender accepts the commercial risk that his assignment of book debts is not effective as against all third parties.

Similarly under the laws of the province of Ontario an unregistered conditional sale contract covering goods which are not sold for the purposes of resale will be effective as against the trustee in bankruptcy of the conditional purchaser. It will not be effective as against subsequent purchasers or mortgagees of the goods. Section 169 of Bill C-60 as drafted would deem such a conditional sale contract to have been executed immediately prior to the filing of the bankruptcy petition.

RECOMMENDATIONS

1. Section 166 (1) of Bill C-60 should be deleted. The present Bankruptcy Act and Bill C-60 do not require registration of debentures, chattel mortgages or conditional sale contracts. The validity of these security agreements depends on provincial law. There is no logical reason for the treating assignments of book debts any differently.

2. Section 169 should be varied by deleting the words "third parties" and inserting in their place the words "a trustee in bankruptcy of the transferor".

(g) RIGHTS OF TRUSTEE IF TRANSFER UNENFORCEABLE

Section 76 of the present Bankruptcy Act provides a trustee in bankruptcy with rights against a transferee of property of the bankrupt under a transaction that is set aside, where the transferee has sold, disposed of, realized or collected the property or any part thereof. Similar provisions have not been included in Bill C-60. Section 161 (2) of Bill C-60 does stipulate that when a transfer by way of a security interest is unenforceable, the court may direct the holder of the security interest to preserve the property for the benefit of the estate or may vest the property subject to the security interest in the estate, if such an order does not prejudice a security interest that is prior in time but lower in rank to the security interest that is unenforceable against the trustee. Neither of these alternatives is very practical and it is very difficult to determine when the second alternative would be applicable.

RECOMMENDATIONS

1. Subject to recommendation 2, if a transfer is unenforceable as against the trustee, the trustee should be entitled to recover the property or the value thereof or the money or proceeds therefrom from the person who acquired the property from the bankrupt or from any other person to whom the original transferee may have resold or paid over the proceeds of the property.

2. If the subsequent transferee of the property has paid or given adequate valuable consideration for the property in good faith, a trustee should not be entitled to have recourse against him but should only be entitled to have recourse against the original transferee of the property for recovery of the consideration paid or the value thereof.

3. Where the consideration payable for or upon any sale or resale of such property or any part thereof remains unsatisfied the trustee should be subrogated to the rights of the vendor to compel payment of the amount unpaid.

4. The provisions of Section 161 (2) of Bill C-60 should be deleted.

(h) AVOIDANCE OF PREFERENCES

Under Section 73 of the present Bankruptcy Act a payment to a creditor is set aside as a fraudulent preference if it was made with a view to giving such creditor a preference over other creditors. There have been many court decisions dealing with the issue as to whether or not it is necessary for the trustee to establish that there was concurrent intent on the part of the debtor to give a preference and upon the creditor to receive a preference or whether it is only necessary to prove that there was an intent on the part of the debtor to give the creditor a preference. At the present time this issue has been argued in a case before the Supreme Court of Canada and the decision has been reserved.

Sections 158 and 159 of Bill C-60 setting aside preferential transfers incorporate in their provisions the words "in the normal course of affairs". No reference is made to "intent" or "view". The term "normal course of affairs" is not defined and until there have been many court decisions interpreting it, uncertainty will prevail. It is extremely difficult to determine when the payment of a legitimate debt owing to a creditor would be other than in the normal course of affairs. Nevertheless, the payment could clearly have been made by the debtor with the intent to prefer that creditor. The drafting of a new statute gives an excellent opportunity to establish certainty will respect to the law relating to fraudulent preferences.

(i) TREATMENT OF ARM'S LENGTH CREDITORS

The present Bankruptcy Act contains the presumption that any payment made to a creditor who dealt at arm's length with the bankrupt within three months prior to the date of bankruptcy by an insolvent person is made with the intent to prefer the creditor. This presumption has generated unnecessary litigation. Many creditors who have dealt at arm's length with the debtor have been harrassed by trustees relying on this presumption and have been forced to defend proceedings by the trustee to recover such payments. Section 158 (1) of Bill C-60 avoids preferential payments to a creditor who dealt at arm's length with the bankrupt if the payment was made within six months of the date of filing of the bankruptcy petition. Section 158 (2) provides that if such a payment is made within three months of the filing of the bankruptcy peti-

tion, it is deemed to be made other than in the normal course of affairs unless the contrary is proved.

(j) TREATMENT OF NON-ARM'S LENGTH CREDITORS

Section 74 of the present Bankruptcy Act sets aside preferential payments made by an insolvent person to a related creditor within one year prior to the date of bankruptcy. Bill C-60 avoids preferential transfers to non-arm's length creditors without any limitation. However, if the transfer was made more than one month and less than one year prior to the filing of a bankruptcy petition, the onus is shifted to the creditor to uphold the validity of the transfer. If the preferential transfer is made to a non-arm's length creditor within one month of the date of the bankruptcy petition, it is only valid if it is in satisfaction of a debt incurred within thirty days of the transfer. This provision will have the effect of rendering invalid almost all preferential transfers to non-arm's length creditors within one month of the date of the bankruptcy petition.

RECOMMENDATIONS

1. Your Committee is in agreement with the provisions of Bill C-60 which provide that preferential transfers within longer periods prior to the date of bankruptcy may be attacked by the trustee but it is not in agreement with the introduction of the new untested terms and concepts.

2. A transfer that is a preference should only be set aside if it is proven that the transfer was made with the intent of the debtor to prefer the creditor.

3. A transfer that is preference in favour of a creditor with whom the debtor was dealing at arm's length should be invalid against the trustee where the transfer is made:

(a) when the debtor is insolvent,

(b) less than six months before filing of a bankruptcy petition, and

(c) the debtor intended to give the creditor a preference.

The presumption contained in the present Bankruptcy Act that if such a transfer took place less than three months before the filing of a petition, the transfer was made by the debtor with the intent to prefer the arm's length creditor should be deleted.

4. A transfer that is a preference in favour of a creditor with whom the debtor was not at arm's length should be invalid as against the trustee where the transfer is made:

(a) when the debtor is insolvent, and

(b) the debtor intended to prefer the creditor.

If such a transfer took place less than twelve months before the filing of a bankruptcy petition, there should be presumption that the transfer was made by the debtor with the intent to prefer the creditor and the onus should be placed upon the creditor to rebut that presumption.

5. In addition, if the preferential transfer was made to non-arm's length creditor within one month prior to the filing of the bankruptcy petition, it should only be upheld if the consideration therefor was given within thirty days prior to the date of the transfer.

LANDLORD AND TENANT

(a) EFFECT OF INSOLVENCY CLAUSES IN LEASES

Under most real estate leases the filing of an assignment in bankruptcy or a proposal under the Bankruptcy Act by the tenant gives the landlord the right to terminate the lease. This may produce a very unjust benefit for the landlord, whose rent has been paid in full, but wishes to cancel the lease because he can relet the premises at a higher price. Similarly, in many leases of chattels, the filing of a proposal under the Bankruptcy Act gives the lessor the right to terminate the lease.

Section 183 of Bill C-60 gives the trustee in bankruptcy of the tenant the right to occupy the premises leased by the bankrupt for three months, to elect to retain the lease for the balance of its term and/or to assign the lease. It is intended although not specifically stated that the trustee in bankruptcy should be entitled to exercise these powers notwithstanding a term in the lease giving the landlord the right to terminate the lease upon the bankruptcy of the tenant.

Similar provisions were included in the Bankruptcy Act of 1919. They were deleted from the Act when they were held to be ultra vires of the legislative power of the Dominion Parliament in the case of re Stober; Ex parte Mark Workman Invt. Corpn. (1923) 4 C.B.R. 34 a decision of a judge of the Superior Court of Quebec.

RECOMMENDATIONS

1. The rights given to a trustee in bankruptcy of a tenant by Section 183 of Bill C-60 are desirable but that section should specifically state that such rights may be exercised by a trustee notwithstanding any term or stipulation in the lease to the contrary.

2. Bill C-60 should include a provision that a debtor who has filed a commercial arrangement shall be entitled to retain the leased premises for the balance of the unexpired term of the lease notwithstanding any provision in the lease which gives the lessor the right to terminate it as a result of the filing of a commercial arrangement. Of course, the debtor must observe the other terms and conditions of the lease.

3. A similar provision should apply to leases of chattels.

(b) PREFERRED CLAIM OF LANDLORD

Section 107 of the present Bankruptcy Act allows a landlord to rank as a preferred claim for arrears of rent for a period of three months immediately preceding the date of the bankruptcy and for three months accelerated rent. A landlord is also entitled to an unsecured claim for any additional rent in arrears. In most provinces the landlord is not entitled to any additional claim for rent owing for the period after the date of bankruptcy. The allowance for accelerated rent has been considered to be compensation to the landlord for the termination of his lease as a result of the bankruptcy of the tenant.

Bill C-60 continues to allow a landlord to rank as a preferred creditor for three months arrears of rent but abolishes his right to any accelerated rent as a preferred claim. Instead the landlord is allowed an unsecured claim for damages arising out of disclaimer of a lease by a trustee after deducing any deposit, accelerated rent and rent paid in advance by the tenant. Section 183(13). This provision will create an administrative problem for a trustee. It will be very difficult for the proper amount of such a claim to be determined. What will be the amount of the claim if the trustee disclaims a long term lease and the landlord re-lets the premises for a shorter term at a lower rent? Who will be able to properly assess the rent which the landlord may receive for the period covered by the remainder of the term of the original lease?

RECOMMENDATIONS

1. Section 183(13) which gives a landlord an unsecured claim for damages as a result of the disclaimer of the lease by the trustee should be deleted.

2. The right of a landlord to a preferred claim for three months accelerated rent should be continued.

3. Any payment made by the trustee on account of occupation rent should be credited against the claim of the landlord for accelerated rent.

4. A landlord should not be entitled to rank as a secured creditor for rent in the event of the bankruptcy of a tenant. This is the law in certain of the provinces at the present time. It is desirable to have uniformity in respect of this matter throughout the country.

INQUIRIES BY THE ADMINISTRATOR

The Bill provides for an extensive inquiry to be carried out by the administrator either on his own initiative or at the request of the Superintendent of Bankruptcy. The consequences of this examination which is based on hindsight and a hypothesis of the financial circumstances at a time prior to the bankruptcy could have a serious effect on the bankrupt and/or his agents.

RECOMMENDATION

We recommend that the Bill be amended to provide for input into the investigation by the administrator by interested parties such as creditors, inspectors and the Trustee; and that prior to the administrator's report being filed a summary procedure be established for a reply to the report by the Trustee, the bankrupt and/or his agents.

OBLIGATIONS IMPOSED UPON OFFICERS AND DIRECTORS

(a) LIABILITY FOR DEFICIENCY IN BANKRUPT ESTATE

Section 176 (1) of Bill C-60 provides that an agent is liable for any deficiency in an estate if the agent in his own interest or in the interest in someone related to him caused the bankrupt corporation when insolvent:

(i) to carry on business or to enter into a transaction which could not reasonably be considered to be in the interest of the bankrupt;

(ii) to refrain from carrying on business or from entering into a transaction that at the time would have reasonably been considered to be in the interest of the bankrupt corporation;

(iii) to continue a business by resorting to sales below cost, ruinous borrowings, or similar acts in circumstances where it was not reasonable to expect that bankruptcy could be prevented, or

(iv) to conduct a business with a view to impeding, defrauding, obstructing or delaying the creditors of the corporation generally.

An agent is defined in Bill C-60 to include an officer or director of a corporation, the controlling shareholder of a corporation or a person who performed the functions of an officer of a corporation. Section 2. An agent is not liable if at a later time he can prove the debtor was insolvent, the debtor was able to pay his debts and the debtor was paying his debts generally as they become due. Section 176 (3). The liability of the agent is limited to the amount of the loss or damage caused to the estate. Section 178. These sections are new and impose civil liability on persons who are abusing the corporate veil to their own advantage and to the detriment of the creditors of the company. The provisions of Section 176 are applicable if the agent for his own advantage caused the corporation to do a legal act which was not in the best interests of the corporation. The term "in his own interest" is imprecise. In many cases an agent will also be a shareholder of the corporation and an attempt to restore the corporation to financial health is always in the interest of a shareholder. Any step taken by a shareholder to avoid bankruptcy of the corporation could be interpreted to be in the interest of that person. Directors may be reluctant to attempt to rejuvenate a failing corporation if at a later time they could be held responsible for the failure of their efforts.

The term "agent" may also include a receiver or manager appointed by the court or by a creditor to carry on the business of the company. If such a person acts in his own personal interest, he should be subject to the same sanctions as an officer or director of the company. He should not be subject to such sanctions if he acts solely in the interests of the corporation. It has been suggested that the words "someone related to him" could be interpreted as meaning the company for which he is acting as receiver or manager. It is clear that it is not the intention of the section to impose an obligation on a receiver and manager who acts in good faith in what he considers the best interests of the corporation.

RECOMMENDATIONS

1. The phrase "in his own interest" should be clarified in order to establish that it does not include any benefit enjoyed by the agent and others in their capacity as shareholders of the company.

2. The Words "other than the corporation" should be inserted after the words "or the interest of someone related to him" in order to clarify the fact that the person related to the agent must be someone other than the corporation.

3. Sub-section 1(a), (b), (c) and (d) of Section 176 should use similar language. We would recommend that Section 176 (1)(a) read as follows:

> "to carry on business in a manner that, at the time, would not have reasonably been considered to be in the interests of the person."

Sub-section (b) would read:

> "to enter into a transaction that, at the time of the transaction, would not have reasonably been considered to be in the interests of the person."

Sub-section (c) would read as follows:

> "to refrain from carrying on business in a manner that, at the time, would reasonably be considered to be in the interests of the person.

Sub-section (d) would remain the same.

(b) IMPOSING THE STATUS OF A BANKRUPT

At the present time, an officer or director of a bankrupt company is only subject to censure if a criminal offence or an offence under the Bankruptcy Act can be proven. An officer or director of a bankrupt company may set up a similar business as the business carried on by the bankrupt corporation using information and contacts acquired while running the bankrupt corporation. On the other hand, an undischarged individual bankrupt is guilty of an offence under Section 170 of the present Bankruptcy Act if he carries on a business without disclosing to each person he deals with that he is an undischarged bankrupt. He is also guilty of an offence if he obtains credit, other

than the supply of necessaries, for a total of more than five hundred dollars ($500.00) without disclosing he is an undischarged bankrupt. No civil disability is placed on contracts between bankrupt and third parties.

Bill C-60 attempts to rectify the present inequities between the restrictions imposed upon an individual who personally goes bankrupt and the lack of restrictions imposed upon officers and directors of bankrupt corporations. It provides that an agent of a corporation may be deemed a bankrupt for the purposes of Sections 210 to 217 and Section 359 if he is found by the court to be primarily responsible for the bankruptcy or if he substantially aggravated the insolvency or if any of the circumstances under Section 200 are proven. An agent of a corporation who is found guilty of culpable conduct is punished by being subject to the same restrictions as an individual who has gone bankrupt. Such an order will be effective for five years from the date of the bankruptcy of the corporation. Section 221 (3)(c).

These sections create an absurd situation. A person who is solvent and able to pay his debts in full is declared to have the status of a bankrupt. They are also very rigid in their nature. The court is not given any discretion in making the order declaring the agent to have the status of a bankrupt.

No variation in the length of time during which the deemed bankrupt' status is imposed is permitted. No flexibility in the sanctions imposed is allowed. In addition, the restrictions imposed upon undischarged bankrupts generally are very cumbersome. They impose penalties on third parties dealing with a bankrupt. For example, a person extending credit to a bankrupt directly or indirectly for the purpose of assisting him in carrying on his business cannot enforce repayment of the debt unless the lender can prove he extended such credit in good faith. Section 211. Failure to inquire whether the other party to the agreement is a bankrupt is not proof of bad faith. Section 213. An unfair and unnecessary burden is imposed on credit grantors. An undischarged bankrupt could receive credit and subsequently refuse to repay the debt by alleging that the lender was aware of the fact that he was an undischarged bankrupt when the debt was incurred. This type of abuse of the Bankruptcy Act should not be permitted. Restrictions created by the status of a bankrupt should only be imposed upon the bankrupt himself and should not derogate from the rights of third parties.

The most common complaint concerning bankruptcy is that a person may go bankrupt but still carry on the same business. This may be accomplished by the use of a corporation or by a bankrupt working for his wife, under the present law.

RECOMMENDATIONS

1. The concept of deeming an officer or director of a bankrupt corporation to be a bankrupt should be deleted.

2. An officer or director of a bankrupt corporation who has been guilty of culpable conduct with respect to the affairs of the bankrupt corporation should have sanctions imposed upon him similar to those sanctions which may be imposed on an individual bankrupt who is guilty of improper conduct.

3. The sanctions imposed upon a bankrupt should not derogate or affect the rights of third parties.

4. The complicated civil sanctions imposed upon an undischarged bankrupt as set out in Sections 210, 211, 212, 213 and 214 of Bill C-60 should be deleted.

5. An undischarged bankrupt and an agent for a bankrupt corporation should be prohibited from directly or indirectly carrying on the same or similar business to that carried on by the bankrupt for a period of two years from the date of bankruptcy. This prohibition would be automatically imposed upon the making of the bankruptcy order without the necessity of an investigation by the administrator. The court should have the power to reduce the period of prohibition or to remove that prohibition if the conduct of the bankrupt or agent was not subject to censure. The court should also have the power to extend the period of prohibition.

6. If a court found that the conduct of a bankrupt or the conduct of an agent of a bankrupt corporation was subject to censure, the following restrictions may be imposed by the court for such period of time as the court may determine:

(a) He shall not be entitled to act as an officer, director or agent of a corporation;

(b) He shall be prohibited from directly or indirectly managing or carrying on any type of business.

Such an application could be brought by the administrator, the trustee or a creditor.

7. An individual bankrupt should be required to disclose the fact that he is subject to an order of the court vesting in the trustee the whole or part of his income or property to:

(a) all persons with whom he incurs debts in the course of carrying on a trade or business, and

(b) all persons from whom he obtains credit to the extent of $500.00 or more.

8. A bankrupt or agent of a corporation who fails to follow these restrictions should be guilty of an offence punishable on summary conviction.

MEETINGS OF CREDITORS

Section 87 of the Bankruptcy Act provides that a creditor is entitled to vote at any meeting of creditors if he has deposited with the trustee a proof of claim at any time prior to the time appointed for the meeting. The Bill provides that in order to vote at a first meeting of creditors a creditor must file a proof of claim "at least one clear day before the date fixed for the meeting".

The Bankruptcy Act provides that voting at a meeting of creditors be calculated as follows:

(a) *One vote* for every claim of over twenty-five dollars and not exceeding two hundred dollars;

(b) *Two votes* for every claim of over two hundred dollars and not exceeding five hundred dollars;

(c) *Three votes* for every claim of over five hundred dollars and not exceeding one thousand dollars;

(d) *Three votes* for every claim of one thousand dollars and *one additional vote* for each additional one thousand dollars or fraction thereof.

The Bill provides that voting at a meeting of creditors will be calculated on the basis of one vote for every claim of $1,000 or less and one additional vote for each additional $1,000 or part thereof.

Section 94(4) of the Bankruptcy Act provides for the creditors or the inspectors to fill any vacancy on the board

of inspectors. The Bill provides that the only mechanism for filling a vacancy on the board of inspectors is through a meeting of creditors.

RECOMMENDATIONS

1. We are of the opinion that the requirement to file a proof of claim "at least one clear day before the date fixed for the meeting" may be an onerous burden placed on the creditors and accordingly recommend that the creditor should be entitled to vote provided he files a claim up to the time called for the meeting and at the place the meeting is held. This method which is provided in the present Bankruptcy Act has not placed any undue hardships on the creditors and on the chairman of the meeting.

2. We recommend that voting be based on the actual dollar value of the claim allowed by the chairman of the meeting for purposes of voting.

3. We are of the opinion that the filling of a vacancy on the board of inspectors by a meeting of creditors is a costly and unnecessary expense to the bankrupt estate and recommend that the present practice continue whereby a vacancy on a board of inspectors can be filled by a meeting of inspectors.

BOARD OF INSPECTORS

Bill C-60 continues the practice of the present Bankruptcy Act which provides that a meeting of creditors 5 representatives from the trade and service creditors may be elected to the board of inspectors. Bill C-60, however, goes further and provides that in addition the Superintendent may appoint an inspector where Her Majesty in right of Canada has filed a claim which has not been disallowed and where Her Majesty in right of a province has filed a claim which has not been disallowed. In addition, the Superintendent may appoint a Supervisor of an estate who shall exercise surveillance over the administration of the estate by the Trustee.

Section 294(4) provides that at every meeting of inspectors a chairman be appointed.

Section 295(2) requires a meeting of creditors to be called to fill vacancies on the board of inspectors.

RECOMMENDATIONS

1. We are of the opinion that the maximum number of inspectors in an estate should be 5 and that representatives of the Crown must be elected by the creditors to be an inspector. Also, the position of Supervisor should be eliminated and in its stead the Trustee should be required to send notices of all meetings of inspectors to the Bankruptcy Administrator, who may designate a person to attend such meetings of inspectors as he deems necessary.

2. In our opinion, the present provision where a Trustee is a chairman of inspector meetings works well and should be continued

3. We are of the opinion that implementation of the provision of Section 295(2) will result in an unnecessary expense and vacancies should be filled by the surviving inspectors on any estate

4. In addition to the powers of inspectors, we recommend that the Trustee must present annually for approval to the inspectors a statement of receipts and disbursements on his administration, which statement or a summary thereof when approved should be forwarded for information purposes to all known creditors in a file.

ORDER OF PRIORITY

The present Bankruptcy Act provides for claims of the Crown to be paid in priority to unsecured creditors. It is generally felt that this is the reason for creditor apathy in the administration of a bankrupt estate. Bill C-60 removes the preferred position of claims of the Crown save and except for the right of the Crown to monies held in trust.

Section 254(1)(i)(vi) of Bill C-60 defers all claims for interest in excess of five per cent which may be owing prior to the date of bankruptcy. Section 257(2) requires the trustee to review any account which was settled between the debtor and the creditor within three years prior to the date of the bankruptcy to determine if interest at a rate in excess of five per cent has been charged. This provision is most unrealistic and will create an administrative nightmare. Why is the rate of five per cent chosen when the rate of interest presently charged by the Bank of Canada is nine and one half per cent per annum? Section 249(2) of Bill C-60 already gives the trustee the right to disallow all or part of a claim if the cost of money borrowed by the debtor is excessive or the terms of the transaction are harsh or unconscionable.

Section 254(1)(j) which is the last subsection in the order of priority provides for the payment of interest at the rate of five per cent from the date of the bankruptcy or the date of the filing of a proposal. Your committee is of the opinion that the payment of such interest to ordinary creditors should have priority over the payment of the claims set out in Subsection 254(1)(i) such as a claim arising from a gift, Subsection 254(1)(i)(iii). It is very doubtful as to whether the type of claims set out in Subsection 254(1)(i) should even rank as claims.

RECOMMENDATIONS

1. Your Committee concurs with the removal of the preferred position of claims of the Crown.

2. Subsections 254(1)(i)(vi), 257(2), 257(3), and 257(4) should be deleted.

3. Subsection 254(1)(j) which provides for payment of interest after the date of bankruptcy should have priority over Subsection 254(1)(i). The order of priority of the subsections should be reversed.

DISCHARGED OF DEBTS

One of the purposes of the Bankruptcy Act is to provide an insolvent person with relief from the burden of his debts. Under Section 148 of the Bankruptcy Act, once discharged a bankrupt is released from the following debts:

(a) any fine or penalty imposed by a court or any debt arising out of a recognizance or bail bond;

(b) any debt or liability for alimony;

(c) any debt or liability under a maintenance or affiliation order or under an agreement for maintenance and support of a spouse or child living apart from the bankrupt;

(d) any debt or liability arising out of fraud, embezzlement, misappropriation or defalcation while acting in a fiduciary capacity;

(e) any debt or liability for obtaining property by false pretences or fraudulent misrepresentation;

(f) liability for the dividend that a creditor would have been entitled to receive on any provable claim not disclosed to the Trustee, unless such creditor had notice or knowledge of the bankrupt-

cy and failed to take reasonable action to prove his claim; or

(g) any debt or liability for goods supplies as necessaries of life and the court may make such order for payment thereof as it deems just or expedient.

Section 233 of Bill C-60 provides that the bankrupt is not released from the following debts:

(a) a fine or penalty imposed by a Court;

(b) a debt arising out of a recognizance or bail bond;

(c) a liability to pay maintenance and support in respect of another person for a period subsequent to the date of bankruptcy or the filing of a proposal.

Your committee does not support the provisions of Bill C-60 which have the effect of releasing a bankrupt from debts for fraud or necessaries of life. The release of a bankrupt from debts incurred as a result of fraud could lead to very serious abuse. The release of a bankrupt from debts for necessaries of life might prevent a person from obtaining credit for such necessaries in a time of need.

Your committee considers the provisions of the present Bankruptcy Act with relation to those debts which are not discharged by a bankruptcy satisfactory. However, a bankrupt who receives his discharge is left in the uncertain position of being unaware of whether or not a creditor is intending to allege that a particular debt is not discharged by the bankruptcy.

RECOMMENDATIONS

1. The present provisions of the Bankruptcy Act should be retained subject to the removal of the anomaly that only debts for *goods supplied* as necessaries of life are not discharged. All debts incurred for goods supplied or services rendered for necessities of life should not be discharged.

2. If a creditor seeks to establish that the debt owing to him by the bankrupt is not discharged by the bankrupty he should be required to file a notice of opposition to the discharge of the bankrupt. The failure to file such a notice shall have the effect that such a debt and all other debts of the bankrupt outstanding at the date of the bankruptcy shall be discharged with the exception of those debts listed in Section 233 of Bill C-60. Upon the filing of such a notice of opposition the court should direct a trial of an issue before the Registrar or any judge or officer of any of the courts of the province in order to determine whether or not the particular debt is discharged by the bankruptcy. The order of discharge should set out any debts for necessaries or incurred as a result of fraud which are not discharged.

STOCKBROKERS

The present Bankruptcy Act does not contain provisions which apply specifically to stockbrokers or to the administration of the estates of bankrupt stockbrokers. However, such bankruptcies have given rise to many unique and difficult problems. Three situations generate most of these problems:

(a) Property held in safekeeping or "segregation".

This is property of the client which is left in the possession of the stockbroker for the convenience of both the client and the stockbroker. It is normally, but not always, identified specifically to one client and the relationship is one of bailment or trust.

(b) Property in transit.

A stockbroker may be indebted to his customer with respect to funds provided for the purchase of securities or resulting from the sale of securities or the stockbroker may have received securities which are to be sold or which have just been purchased. Such funds or securities are normally referred to as "property in transit".

(c) Property provided to the stockbroker to secure indebtedness.

Some clients borrow money from stockbrokers for security transactions and pledge securities as collateral security therefor. These pledged securities are put into transferrable form by the client. The stockbroker will borrow funds from a bank and pledge these securities as security for such loans. There is no allocation with respect to an individual client when the securities are pledged to a bank.

At the time of a bankruptcy, the bank will sell the most marketable securities held by it. These may be securities of clients which are in default to the broker, but in many cases they are securities of clients who are not in default. When the trustee takes possession, he is often faced with books of account which do not reflect the current status of transactions and deliveries, improper realization and, at times, improper segregation or misuse of securities in safekeeping. Although the property in safekeeping is technically not part of the estate of the bankrupt stockbroker, the trustee is reluctant to return securities to clients until he is certain that they are solely the property of that client. This has caused trustees to seek court approval before dealing with the securities. The result has been substantial time delays and significant expense. This problem is compounded by the volatile nature of the securities market and the potential damages caused by such delays. In most cases when a trustee has brought such an application to the court, the equitable doctrine of tracing has been applied.

A second area of difficulty arises because some clients have had their securities sold by the bank while others have not. The courts have attempted to deal with this problem in several ways. One method has been to decide that tracing is not applicable to securities which have been endorsed into transferrable form and pledged to a financial institution. The effect of this has been to put all of those clients on an equal footing with one another and with the creditors of the stockbroker. The assets of the firm, including any pledged securities which have been returned, are divided equally among such clients and creditors. Another method has been to adopt the concept of "sharing the burden of the loss". In that case, the proceeds of the returned securities are allocated among all the clients having pledged securities.

Bill C-60 contains specific provisions relating only to the bankruptcy of a stockbroker. The Bill attempts to solve the problems created by the application of the doctrine of tracing and by the sale of pledged securities by means of the simple expedient of vesting *all* assets of clients held by the stockbroker in the trustee. A separate fund is established which consists of all money and securities in the possession of the stockbroker at the date of the bankruptcy. Such securities and moneys are treated in the same manner, although they may be held for numerous different purposes and under various differing legal relationships. Clients of the stockbrokers who have claims against the stockbroker for the delivery of securities or the payment of money will have a first claim against the fund

after payment of administrative costs. Section 310. The Bill differentiates between normal clients, (which the Bill refers to as "customers"), members of the firm who were trading in securities, ("related customers"), clients who had contributed to the bankruptcy ("deferred customers"), and trade creditors. The Bill creates an order of priorities for each of these groups against the pool of money and securities held by the stockbroker, with the normal customers having first priority and the deferred customers last.

RECOMMENDATIONS

1. Where securities are in safekeeping or "segregation", they should not be treated as assets of the stockbroker. Those securities should be returned to the clients as quickly and as inexpensively as possible. In most cases there is little difficulty in determining which securities are in safekeeping and to whom they belong.

This recommendation is not intended to continue the cumbersome concepts of tracing. The rights of the trustee to return securities under these circumstances should be strictly limited to securities in "safekeeping" which should be defined in the Bill. Securities in transit should not fall within this definition.

2. Securities belonging to related or deferred customers should vest in the trustee in bankruptcy for the benefit first of customers whose securities are lost or misplaced or whose pledged securities have been sold, and subsequently in the order of priorities provided in the Bill.

3. The following provision should become applicable if a compensation or contingency fund established by the securities industry is in existence and participates in a bankruptcy. Where such a contingency fund is in existence and participates in a bankruptcy, its involvement is normally either:

(i) to guarantee the bank indebtedness or the stockbroker so that the bank will not realize on its security and there will not be a shortfall, or

(ii) to reimburse individual customers with respect to any shortfall resulting from the sale of pledged securities or from any loss or misappropriation of securities or money.

Customers with claims for securities in transit should be treated in the same fashion as customers whose securities were delivered to the stockbroker to secure the indebtedness of the customer to the stockbroker. All such customers should share equally in the money and securities in the possession of the trustee at the date of bankruptcy save and except the securities held by the stockbroker in safekeeping which should be returned to the customer by the trustee as soon as possible after the bankruptcy has occurred. The concept of a special customers' fund should be maintained to give the customer whose securities were not in safekeeping the greatest possible protection. This would result in a general sharing of the burden of the loss among such customers and simplify administrative problems.

There are a number of problems to this approach. The first of these is to determine what kind of contingency fund should permit the use of this provision. Provincial securities legislation refer to compensation funds or contingency trust funds required in respect of registrants under such legislation. If such a fund is satisfactory for the purposes of that legislation, it should be considered to qualify for the purposes of the Bankruptcy Act.

A second difficulty is the determination by the trustee in Bankruptcy of when the contingency fund has become committed to involvement in a bankruptcy. Such a fund should be required to do some overt act to establish its involvement. Once it becomes involved, the claims of all customers, other than related and deferred customers, should be satisfied by the assets of the stockbroker and the fund. The securities in safekeeping would be returned to the customers immediately. Any deficiencies arising with respect to securities in transit, proceeds of pledged securities or securities which have been lost, misappropriated or misplaced should be made up by the contingency funds. Thus, the customers would be completely protected.

The specific commitment that a trustee in bankruptcy would require from the fund would be for it to either guarantee all bank indebtedness or to undertake that all customers other than related or deferred customers were fully compensated at the conclusion of the bankruptcy for any loss suffered as a result of the bankruptcy.

4. If no contingency or compensation fund was in existence or if such fund could not or did not participate, the following provisions would apply:

(a) All securities in safekeeping would be returned to the customers.

(b) Customers who are able to trace their securities using tracing rules specifically set out in the Bill would be entitled to receive all the securities which they could trace. A codification of the rules relating to tracing would alleviate the necessity of the trustee in bankruptcy spending time and money to obtain court approval with respect to all but the most unusual situations. This would result in a more rapid and less expensive resolution of stockbroker bankruptcies.

The rules of tracing should be based on the following principles:

(i) Securities which are "in transit" may be claimed where they can be identified or traced to the customer.

(ii) Where the securities of a particular type on hand equal or exceed the claims of customers, other than related and deferred customers, for securities of that type, the securities would be returned.

(iii) Where the securities of a particular type on hand are less than the claims of customers, other than related and deferred customers, for securities of that type, a pro rata distribution of the securities on hand would be made.

(c) All other moneys and securities of all customers, including related and deferred customers and the stockbroker would be pooled and either liquidated or used in specie at their values as at the date of the bankruptcy. The distribution of the proceeds and/or the securities would be made to all customers, other than related and deferred customers, on a pro rata basis.

INSURANCE

Part III of the Winding Up Act of Canada applies to the liquidation of insolvent insurance companies. The present Bankruptcy Act specifically excludes insurance companies from the definition of corporations to which the Bankruptcy Act applies. Section 2(f). Section 162 of the Winding Up Act provides that claims against an insolvent insurance company shall be paid in the following order of priority:

(a) costs of liquidation

(b) claims of preferred creditors
(c) if no reinsurance is effected, claims under policies and claims for the value of policies rateably
(d) if there is reinsurance, *first* claims under policies, *secondly* claims for the cost of reinsurance.

Bill C-60 contains Part VIII, a separate part, which is only applicable to insolvent insurance companies. It permits the federal or a provincial superintendent of insurance to act as a trustee of a bankrupt insurance company. A provincial superintendent of insurance may act as trustee in respect of a company incorporated pursuant to an Act of a provincial legislature if the company is not registered under the Canadian and British Insurance Companies Act. The federal superintendent of insurance may act as trustee of all other insurance companies carrying on business in Canada. Different sections apply to the distribution of assets of a life insurance company and insurance companies which are other than life insurance companies (non-life insurance companies) Section 340(1) and 341(1). Under Bill C-60 the assets of a bankrupt life insurance company shall be applied in the following order or priority:

(a) debts incurred by an interim receiver or a trustee while carrying on the business of the debtor
(b) the costs of administration
(c) the following claims rateably:
  (i) claims under policies
  (ii) claims for value of policies
  (iii) claims for proceeds of settlements left on deposit
(d) claims of all other creditors in order of priority of Section 254(1).

The assets of a bankrupt non-life insurance company are distributed differently. After similar provision for the payment of business debts incurred by a trustee or an interim receiver and the costs of administration, the following is the order of priority:

(a) claims arising out of the liability of the insurance (third party liability claims)
(b) other types of claims under a policy
(c) claims for the value of subsisting policies
(d) claims of all other creditors in order of priority of Section 254(1).

Your Committee is of the opinion that in the case of non-life insurance companies third party liability claims should not be paid in priority to other claims arising under a policy such as a fire loss claim. The policy holder who has suffered a fire loss, deserves the same protection as a policy holder involved in a motor vehicle accident.

A concern has been expressed that the bankruptcy of an insurance company could be caused by a catastrophic loss to one large insured. With the provision that all claimants are paid rateably the small claimants would be required to absorb the loss which should have been reinsured. To relieve the small claimants of this burden, it has been suggested that third party liability claims against non-life insurance companies should be subject to a limit of $50,000 in any one occurrence.

Your Committee is of the opinion that imposing a maximum limit on the amount of a third party liability claim payable out of the assets of a non-life insurance company places too great a hardship on the policy holder who expected to be fully protected. Even if his claim is allowed in full he might suffer a loss if the assets are not sufficient to pay all the claims in full. To impose upon him an additional loss by virtue of the fact that only a third party claim up to $50,000 would be allowed priority seems unjust and inequitable.

Recommendations

1. With respect to a non-life insurance company third party liability claims should rank rateably with other types of claims under a policy. This maintains the law as it presently exists under the Winding Up Act.

2. Claims for the value of subsisting policies should be subordinated to claims arising under a policy issued by a non-life insurance company.

RECEIVERSHIPS

Many sophisticated lenders require the borrower to issue a debenture as security for the repayment of the loan. Most debentures contain a floating charge on all the property, assets and undertaking of the borrower. The most effective way of enforcing this type of security is the appointment of a receiver and manager who takes possession of all the assets of the debtor and proceeds to realize upon them to satisfy the debt owing to the debenture holder. Similar security is available in the Province of Quebec under the Special Corporate Powers Act using a trust deed which is enforced by the appointment of an agent. Such a person comes within the definition of receiver in Section 342 of Bill C-60.

In the present Bankruptcy Act there are no provisions specifically relating to receiverships. The general law relating to secured creditors is applicable. It permits a secured creditor to proceed with the realization of the assets of the debtor unless the trustee intervenes and obtains a court order staying proceedings by the secured creditor. A common complaint by an ordinary creditor is that he is unable to obtain information about the receivership and the disposition of the assets of the debtor. It is most important that an equitable balance should be maintained between the right of a secured creditor to have his indebtedness repaid within a reasonable time in the event of default by the debtor and the rights of the trustee and the creditors to obtain the maximum amount from the sale of the assets of the debtor.

Bill C-60 attempts to solve these problems by making all receiverships subject to the order of the court (Sections 343 and 344). These sections are applicable whether or not the receiver was appointed by an order of the court. The powers granted to the court are extremely broad and include the power to abrogate or modify the terms of the original security agreement. Section 343 (3). The court may make any order it thinks fit. Section 344. No restrictions or guidelines are imposed upon the discretion of the court.

Your committee is of the opinion that the provisions of Sections 343 and 344 are unduly restrictive with respect to the rights of secured creditors to enforce the security held by them in accordance with its terms. We are in agreement with the provisions which improve the right of a trustee or a creditor to obtain information from a receiver.

Recommendations

1. The Bill should stipulate a standard of conduct which a secured creditor or a receiver is required to adopt in realizing on security and out of which he cannot contract. We would recommend that the secured creditor or receiver should be required to act in a commercially reasonable manner with respect to matters relating to realizing upon the property of the debtor. If a secured creditor or receiver deviates from such a standard he would be liable to the trustee for any damages suffered.

2. The provisions of Section 242(1) of Bill C-60 which provide the trustee with the right to apply to the court for an order postponing realization by a secured creditor should also be applicable to realization by a receiver.

3. Sections 343 and 344 of Bill C-60 should be deleted.

4. The court should have the power to tax the remuneration and the expenses of the receiver and to order the receiver to pay to the trustee any surplus funds realized from the assets of the debtor.

COURTS

(a) REGISTRAR IN BANKRUPTCY

Bill C-60 continues the present practice of giving the Supreme or Superior Court of the province or territory where the bankruptcy occurs the right to adjudicate on bankruptcy matters. It also gives the Minister of Consumer and Corporate Affairs with the concurrence of the Minister of Justice the power to authorize a judge of a county court to exercise any or all of the powers of the Supreme or Superior Court in bankruptcy matters.

The position of registrar in bankruptcy has been abolished and matters previously decided by the registrar will be heard by officers and judges of the trial division of the Supreme or Superior Court of the province and by the bankruptcy administrator. As a result, the adjudication on bankruptcy matters will be delayed because in most cases the regular civil court process takes longer to determine an issue than the length of time taken by the registrar under the present system. At the present time the registrar in bankruptcy gives precedence to urgent bankruptcy matters, such as the appointment of an interim receiver and the making of a receiving order when a petition in bankruptcy is not disputed. It is unlikely that the officers and judges of the Supreme or Superior Court hearing all types of civil matters will be able to give these bankruptcy matters the same precedence.

Appeals from the disallowance of claims by the trustee will be heard by the regular civil trial division of the courts. This will delay the winding up of estates and the payment of final dividends because in most cases the length of time for a civil matter to come to trial is much longer than the length of time taken by the registrar to decide cases involving the disallowance of claims. The usual civil procedure for hearing appeals from disallowance of claims is more complicated and elaborate than the procedure followed in most instances by the registrar. This will also delay the final adjudication and increase the legal costs involved in the proceedings.

Judicial matters, such as determining the amount of the remuneration of the trustee and the solicitor have been delegated to the bankruptcy administrator who most likely will not have a legal background or judicial training. The present system using the registrar in bankruptcy to decide minor judicial matters is working efficiently and economically. No valid reason has been given for the abolishment of the present system which uses registrars in bankruptcy. It is most unlikely that the provincial authorities administering justice will give priority to bankruptcy matters.

The registrar under the present Bankruptcy Act is appointed by the Chief Justice of the province and has independent status subject only to an appeal from his decision. At the present time there is no statutory requirement that the office of registrar must be filled by a lawyer but this has been the practice in most provinces.

Under Bill C-60 the bankruptcy administrator will be appointed by the Superintendent of Bankruptcy and will be subject to the control and general direction of the Superintendent. Section 12 (b). This will prevent the administrator from appearing to have an independent status when he is required to adjudicate upon controversial matters.

RECOMMENDATIONS

1. The office of the registrar in bankruptcy should be retained. The registrar should continue to perform functions similar to those being performed at the present time, such as:

(a) adjudicating on unopposed matters;
(b) the appointment of an interim receiver;
(c) ruling on disallowance of claims;
(d) setting the remuneration of the trustee, interim receiver and accountant;
(e) taxation of the costs of realization of a secured creditor including the costs of a receiver;
(f) taxation of solicitors' accounts;
(g) hearing matters relating to practise and procedure;
(h) hearing trials of issues referred to him by a judge of the Supreme or Superior Court;
(i) settling and signing orders and judgments.

2. The office of the registrar should maintain its traditional independence and should be free from outside direction and control.

3. The office of registrar should only be filled by a lawyer.

(b) DESIGNATION OF A BANKRUPTCY JUDGE

Section 155 (1) of the present Bankruptcy Act is omitted from Bill C-60. It provides that the Chief Justice of a province may nominate one or more judges of the Supreme or Superior Court to exercise the judicial powers and jurisdiction conferred by the Bankruptcy Act. In the provinces with the largest number of bankruptcies, Ontario and Quebec, specific judges have been designated to hear bankruptcy matters. This has resulted in bankruptcy matters being set down for a hearing by these judges in priority to regular civil matters. This is very important since many bankruptcy matters such as a hearing of a disputed involuntary petition require urgent adjudication and should not be delayed until adjudicated upon in the normal civil process. In addition, the judges designated to hear bankruptcy matters have developed a familiarity or expertise in deciding bankruptcy matters.

RECOMMENDATIONS

The present system whereby the Chief Justice of a province may designate specific judges to hear bankruptcy matters should be continued.

(c) POWERS OF THE COURT

(i) To Discharge the Bankrupt

Under the present Bankruptcy Act, every bankrupt must apply to the court for his discharge. Notice of the application for discharge is given to each creditor who has filed a claim with the trustee. The creditor has the right to attend in court and oppose the discharge. This procedure

is a serious waste of time and effort in the majority of cases where there is no opposition to the discharge.

Bill C-60 attempts to solve the problem by providing that an individual ceases to be a bankrupt after ninety days elapses from the date of bankruptcy if the administrator has not filed a caveat. Section 221 (1). The right to make the initial determination of whether a bankrupt is entitled to be discharged from bankruptcy has been transferred from the court to the administrator.

No allowance is made for a trustee or a creditor to oppose the bankrupt's discharge. If the bankrupt is discharged from bankruptcy the court does not have the power to order him to pay a portion of his earnings to the trustee for distribution among his creditors or to vest in the trustee property acquired by the bankrupt after the date of his bankruptcy.

Under Bill C-60 the bankrupt is protected because he has the right to appeal to the court from a decision of the administrator to refuse to grant the bankrupt a discharge. No similar right of appeal from the administrator's decision is given to the trustee or to a creditor.

RECOMMENDATIONS

1. Bill C-60 provides that upon his discharge, the bankrupt is entitled to a certificate of non-responsibility. The more accurate description of the procedure in our view would be achieved by the use of the term "discharge" as in the present Bankruptcy Act.

2. The ninety day period provided in Bill C-60 for the filing of a caveat by the administrator is too short a period of time in our view. If a notice of opposition has not been filed within six months after the date of the bankruptcy a certificate of discharge should be issued without an order of the court.

3. The creditors and the trustee in bankruptcy should be given the right to oppose the discharge of the bankrupt along with the bankruptcy administrator.

4. If a notice of opposition is filed, the trustee must apply for a date for the hearing of the bankrupt's application for discharge and notice of the date of hearing must be given to the person filing the notice of opposition and to the bankrupt.

5. Each creditor and the administrator would be given thirty days' notice by the trustee of the fact that the bankrupt would be entitled to a certificate of discharge automatically unless a notice of opposition was filed.

6. The court upon an application for discharge could:

(a) suspend the granting of the certificate of discharge for any period of time up to a maximum of five years;

(b) order the bankrupt to pay a portion of his future earnings to the trustee for distribution among his creditors, provided that the amount to be paid shall leave the bankrupt with earnings not less than the amount of the earnings which are exempt from seizure under provincial law.

(c) POWERS OF THE COURT

(ii) To Authorize an Advance to the Trustee or Solicitor on Account of his Remuneration

Section 13(3) of the present Bankruptcy Act provides that a trustee can only receive an advance on account of his remuneration with the permission of the inspectors or the court. By directive to the trustees, the Superintendent of Bankruptcy has stipulated that the trustees must obtain the permission of the court rather than the permission of the inspectors. Section 38 of Bill C-60 provides that the administrator may authorize payment to an interim receiver, a trustee, a solicitor or an accountant of an advance on his remuneration.

RECOMMENDATIONS

1. The present practise of requiring the trustee to obtain court approval of an advance on account of his remuneration should be retained.

2. A similar approval of the court should be required for an advance to a solicitor.

(iii) Taxation of Accounts

(a) *Accounts of Trustee*

The present Bankruptcy Act provides that the accounts of a trustee for services rendered to the bankrupt estate must be taxed by the court. The trustee prepares his final statement of receipts and disbursements and submits it to the Superintendent of Bankruptcy for his comments. Then he applies to the registrar to have the statement of receipts and disbursements approved. Included in the statement of receipts and disbursements is the amount claimed by the trustee for his remuneration. After the registrar approves the statement of receipts and disbursements, it is sent to all creditors and they have fifteen days to object to the final statement. This objection is heard by the registrar. If there is no objection, the trustee applies to the registrar for an order discharging him as trustee.

This procedure is cumbersome and involves duplication of effort. Both the Superintendent and the registrar are required to peruse each item in the accounts of the trustee. The creditor is also at a disadvantage when he opposes the trustee's final statement of receipts and disbursements because it has already been approved by the registrar.

Bill C-60 transfers the power to tax accounts of the trustee to the bankruptcy administrator with the right of appeal to the court. Sections 37 and 45. This is an attempt to eliminate the present duplication of work. However, fixing the amount of the remuneration of the trustee, if it is contested, is a judicial function as opposed to an administrative function. In many instances there is no dispute over the amount of the remuneration. In these cases, it should be unnecessary to have the accounts taxed by the court. The court should only become involved in taxing the accounts if any interested party, including the administrator, objects to the amount of the remuneration claimed.

RECOMMENDATIONS

1. The trustee should prepare his final statement of receipts and disbursements and insert therein the amount claimed for remuneration. A copy of this statement should be sent to all creditors and to the bankruptcy administrator for the district. If there is an objection by a creditor and/or the administrator, the trustee must apply to the court for an order fixing the amount of his remuneration. Notice of the application and all supporting material should be served on the person filing the notice of opposition at least ten days prior to the date of the hearing.

2. If there is no objection to the statement of receipts and disbursements, the trustee should be entitled to apply ex parte to the administrator to have his accounts taxed. Upon the passing of the accounts the administrator would not have the power to vary the amount claimed for remuneration. If the administrator is satisfied that the accounts

are correct, he would issue a certificate of termination which would certify that the appointment of the trustee has been terminated.

(b) *Accounts of Solicitors*

The present Bankruptcy Act and Rules require that all accounts of solicitors in excess of $50.00 for services rendered to a bankrupt estate be taxed by the court. This taxation is performed by the registrar with a right of appeal to the bankruptcy court judge.

Bill C-60 has transferred this power of taxation of a solicitor's fees where such fees are not fixed by the court to the bankruptcy administrator. Section 37. There is a right of review by the Superintendent at the request of the solicitor and the right of appeal to the court. Secitons 41 and 45.

In many instances there is no dispute as to the amount of the fees claimed. In these cases the burdensome procedure of taxation should not be required.

RECOMMENDATION

The account of a solicitor for services rendered to the bankrupt estate should be submitted to the trustee and to the administrator. If either party objects to the amount of the account within fifteen days, the solicitor must take out an appointment for taxation of the account by the court. Notice of the appointment should be served upon the trustee and the administrator at least ten days prior to the date of hearing. If no objection to the account is served, the account should be paid by the trustee as soon as sufficient funds are available.

(iv) Control Over the Administrator

Section 19 of the present Bankruptcy Act provides that the court has the power to control and overrule the acts and decisions of a trustee. Bill C-60 continues this provision. Section 383. However, Bill C-60 grants many additional powers to the administrator but there is no provision for any review of the decisions of the administrator by the court.

RECOMMENDATION

The court should be given the power to review and overrule the decisions of the administrator upon the application of the bankrupt, any of the creditors or any other person who is aggrieved by his decision. This power should not apply to decisions of the administrator in routine administrative matters.

CONCLUSION

Bill C-60 represents the culmination of many years of study of bankruptcy and insolvency matters which are necessarily very complex. Your committee was of the opinion that a detailed review and analysis of the Bill was necessary in order to consider the extent of the legal and commercial impact of its provisions. The recommendations we have made are designed to minimize the effect of the new legislation on the commercial lending system and to avoid practical administrative problems. Your committee has recommended the retention of the existing judicial system which is functioning well. Novel concepts in the new Bill have been rejected in situations where your committee is of the opinion that no benefit from a change would be achieved. It is desirable to maintain as much certainty as possible when new legislation is enacted.

Throughout our deliberations we have been assisted by our advisers Melvin C. Zwaig and David E. Baird. We wish to thank them for their efforts on behalf of the Committee.

Your committee also wishes to thank the representatives of the Department of Consumer and Corporate Affairs for their co-operation.

Drafting a bill as detailed and complex as Bill C-60 is a difficult task. Nevertheless, we are confident that the combined efforts of everyone concerned will achieve the goal of producing for Canada a modern practical statute regulating bankruptcy and insolvency matters.

Respectfully submitted,

December 11, 1975

Salter A. Hayden,
Chairman

SCHEDULE "A"

BRIEFS SUBMITTED

THE SUBJECT-MATTER OF BILL C-60, BANKRUPTCY ACT, 1975

1. The Canadian Institute of Chartered Accountants.
2. The Canadian Bar Association.
3. The Canadian Consumer Loan Association.
4. The Toronto, Montreal and Vancouver Stock Exchanges, and the Investment Dealers Association.
5. The Retail Merchants Association of Canada Incorporated.
6. Insurance Bureau of Canada.
7. Federation of Automobile Dealers Association of Canada.
8. Canadian Bankers' Association.
9. Federated Council of Sales Finance Companies.

SCHEDULE "B"

ORAL SUBMISSIONS

1. The Canadian Institute of Chartered Accountants.
2. The Canadian Bar Association.
3. The Toronto, Montreal and Vancouver Stock Exchanges, and the Investment Dealers Association.

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1974-75

THE SENATE OF CANADA

PROCEEDINGS OF THE

STANDING SENATE COMMITTEE ON

BANKING, TRADE AND COMMERCE

The Honourable SALTER A. HAYDEN, *Chairman*

Issue No. 73

THURSDAY, DECEMBER 11, 1975

Complete Proceedings on Bill C-1002, intituled:

"An Act to incorporate the Northland Bank"

REPORT OF THE COMMITTEE

(Witnesses: See Minutes of Proceedings)

29891—1

THE STANDING SENATE COMMITTEE ON BANKING, TRADE AND COMMERCE

The Honourable Salter A. Hayden, *Chairman*

The Honourable Senators:

Barrow	Hayden
Beaubien	Hays
Buckwold	Laird
Connolly (*Ottawa West*)	Lang
Cook	Macnaughton
Desruisseaux	McIlraith
Everett	Molson
*Flynn	*Perrault
Gélinas	Smith (*Colchester*)
Haig	Sullivan
	Walker—(19)

**Ex officio* members

(Quorum 5)

Order of Reference

Extract from the Minutes of the Proceedings of the Senate, December 11, 1975:

"Pursuant to the Order of the Day, the Honourable Senator Cameron moved, seconded by the Honourable Senator Macnaughton, P.C., that the Bill C-1002, intituled: "An Act to incorporate the Northland Bank", be read the second time.

After debate, and—
The question being put on the motion, it was—
Resolved in the affirmative.

The Bill was then read the second time.

The Honourable Senator Cameron moved, seconded by the Honourable Senator Macnaughton, P.C., that the Bill be referred to the Standing Senate Committee on Banking, Trade and Commerce.

The question being put on the motion, it was—
Resolved in the affirmative."

Robert Fortier,
Clerk of the Senate.

Minutes of Proceedings

Thursday, December 11, 1975
(95)

Pursuant to adjournment the Standing Senate Committee on Banking, Trade and Commerce met this day at 12:10 p.m.

SUBJECT:—Bill C-1002—"An Act to incorporate the Northland Bank".

Present: The Honourable Senators Hayden (*Chairman*), Cook, Haig, Lang, Macnaughton, Molson and Smith (*Colchester*). (7)

Present, not of the Committee: The Honourable Senator Cameron. (1)

In Attendance: Mr. R. L. du Plessis, Acting Assistant Law Clerk.

WITNESSES:

Department of Finance:

Mr. C. L. Read, Inspector-General of Banks.

Northland Bank:

Mr. Robert Willson, provisional chairman;

Mr. High Wilson, provisional president and chief executive officer; and

Mr. Alan Scarth, Counsel.

The witnesses explained to and were questioned by the Committee respecting the objects of the proposed bank.

Following discussion, and upon motion of the Honourable Senator Haig, it was *Resolved* to report the said Bill, without amendment.

At 1:00 p.m., the Committee adjourned to the call of the Chairman.

ATTEST:

Frank A. Jackson,
Clerk of the Committee.

Report of the Committee

Thursday, December 11, 1975

The Standing Senate Committee on Banking, Trade and Commerce to which was referred Bill C-1002, intituled: "An Act to incorporate the Northland Bank", has, in obedience to the order of reference of Thursday, December 11, 1975, examined the said Bill and now reports the same without amendment.

Respectfully submitted,

Salter A. Hayden,
Chairman.

The Standing Senate Committee on Banking, Trade and Commerce

Evidence

Ottawa, Thursday, December 11, 1975

The Standing Senate Committee on Banking, Trade and Commerce, to which was referred Bill C-1002, to incorporate the Northland Bank, met this day at 12.15 p.m. to consider the bill.

Senator Salter A. Hayden (*Chairman*) in the Chair.

The Chairman: Honourable senators, we have before us, Bill C-1002, which deals with the incorporation of the Northland Bank. The appearances are: Mr. Robert Willson, provisional chairman; Mr. Hugh Wilson, provisional president and chief executive officer; and Mr. Alan Scarth, counsel. Mr. C. A. Read, Inspector General of Banks, will be here soon, but we can proceed in the meantime.

The Chairman: Mr. Robert Willson will be making an opening statement.

Mr. Robert Willson, Provisional Chairman, Northland Bank: Mr. Chairman and honourable senators, just now, in the course of the second reading in the senate, you heard ample reference to the antecedents of the Northland Bank. The credit unions and a number of co-operative organizations have been studying this matter for some three of four years.

My own history, and connection with the Northland Bank, goes back approximately 18 months, when I was approached by the group that was then examining whether or not to proceed toward the incorporation of a bank. At their invitation I became chairman, with terms of reference which were: first, to examine the feasibility of their expectations and intent; second, to coalesce their expectations so we might have one common cause and a set of agreed strategies and principles; third, to balance the equity so that it might be properly representative of Manitoba, Saskatchewan and Alberta interests; fourth, to prepare the financial and operating model that would be reflective of what the bank would do if chartered, and a forecast of its operations for some three to five years; and, finally, to locate and present to the provisional board for selection a chief executive officer with the competence, capacity and potential to lead the bank.

I spent about a year in pursuit of this assignment. I would like to make it clear, Mr. Chairman and honourable senators, that I am not a banker. I brought to the assignment a varied background in business as a senior executive, as a consultant and as a professor of management. Perhaps one of the reasons this group felt I could contribute in this capacity is that I had been consultant to the chief executive officer of a major banking system in the United States and to some chief executive officers of financial institutions in Canada and in the United Kingdom. I repeat, I am not a professional banker.

My interest was in the management and the organization and the development of strategy by which the bank might be guided, if it proved feasible. To investigate the feasibility, I attended banking conferences staged by the Canadian Bankers Association in Canada and a European banking conference in London. Through these I had an opportunity to talk, in depth and in person, with a number of chief executive and operating officers of various Canadian, United States and European banks. In each case I asked them to define for me their view of the opportunity for banking service that might be most feasible at this point in Canada that was not now covered. I asked them to describe some of the pitfalls and hazards of the commencement of banking operations and also some of the caveats by which we should be guided, if we proceeded. This was a very enriching and educational experience for me.

Then, with some information and questions in hand, I sought the advice of the Inspector General of Banks in Ottawa, so that I might be instructed in the responsibilities that would be laid upon any bank applying for a charter. I was very pleased with that opportunity to be so instructed.

There were several investigations which were intensive, including discussions with present executive officers of existing Canadian chartered banks. They were openly helpful in counselling me, and certainly not concerned about the competition we might represent. There were discussions with retired executives of some of the Canadian chartered banks as well, who were able to speak with me on a personal basis.

As a result of all this investigation, I was finally able to produce for the provisional board's consideration and approval a statement of purpose and major strategies, which appears in a publication which we have distributed to you for examination at your subsequent leisure. I was also able to produce a financial forecast, which I then subjected to the scrutiny of several present bankers before asking for board approval.

With this in hand, we felt ready to search for a chief executive officer. I sought the advice of bankers and financial house executives in Canada, the United States and the United Kingdom for references.

In a series of cross-references I identified a list of some 28 potential candidates for the office. These were not interested people; they were drawn to my attention by people who knew them. Finally presented to the board, and accepted by them as our chief executive officer, was Mr. Hugh Wilson, who is a Canadian citizen with a rich background of some 25 years in banking, first gained in Western Canadian banking at the branch level and then in international banking in Europe and the Far East, stationed in the United Kingdom for a period, and latterly as a vice-president for the international operations of a United States bank. Our reading from all our references

was that we had been most fortunate in obtaining a prudent, innovative and experienced senior officer who would not only have the respect of his colleagues in the banking industry but who could undertake the assignment that we saw to be an innovative one.

Before concluding my statement, I should like to draw your attention to three unique aspects of the Northland Bank which we propose. First, we have an exceptionally broad base of support and referral. This leads us to believe that we will have not only immediate support but also the confidence of several hundred thousand Canadians involved through the subscribers to the bank, or directly, during the start-up period and before we are in a position to pay dividends. Second, business will be our customer. We will not be aggregating deposits on a consumer basis, as is the traditional pattern. We will therefore be staffed to counsel business on the use of the funds that we provide. Finally, we will be relying upon our skill to buy and manage money as a wholesale bank. These are the three unique aspects I referred to. Thank you, Mr. Chairman.

The Chairman: Is that where you propose to get your money?

Mr. Willson: We have authorized capital of $20 million proposed in our bill. We have paid-up capital of $10 million, of which we have approximately $5 million presently committed. The balance will be subscribed to in Canada, with a small reserve for the possibility of international investment, to which our chief executive officer can make reference.

The balance will be subscribed on as broad a base as we can contrive throughout the communities to be served. Whether or not it will be a public or private issue is a matter to be referred to the board for determination, but the strategy will be to have as broad a base of distribution as possible.

The Chairman: I was wondering to what extent you will seek deposits.

Mr. Willson: Mr. Chairman, may I defer to my colleague for that answer, because I think it might be useful to have that described by him?

Mr. Hugh Wilson, Provisional President and Chief Executive Officer, Northland Bank: Mr. Chairman, in response to your question as to the extent to which we will be seeking deposits, may I say that we will be carrying on a banking business and in the traditional or normal sense we will be seeking deposits. We will not be consumer oriented, however, nor will we be a retail bank in the accepted sense of retail banking in Canada, and the bulk of our deposits will be bought deposits from our commercial clients and from the money markets in Canada.

The Chairman: I am trying to get a picture of the scope of the operation in order to see how much the bank will have to operate with. Maybe you can give me an estimate of what you think is a workable amount of money needed to have a successful operation.

Mr. Wilson: We have drawn up a five-year projection. From year one to year five the projection is that in the fifth year the total assets will be $323 million. I am just going by memory on that. Of the $323 million, roughly 90 per cent would be on the liability side of the balance sheet or deposits. But, of course, it is a much more modest figure in the year one, but growing successfully, recognizing prudent practice and accepted ratios within the industry.

The Chairman: What is the modest estimate for year one?

Mr. Wilson: If I might just refer to my projections, the total deposits in year one would be about $70 million.

Senator Molson: You are projecting a loss for that year, are you not?

Mr. Wilson: Yes, sir.

Senator Molson: How many years will it be before you get to the break-even point?

Mr. Wilson: That would be at the end of the second year.

The Chairman: What is the increase in deposits in the second year?

Mr. Wilson: We would move from the $70 million figure to about $150 million in deposits at that time.

The Chairman: It is a little more than double.

Mr. Wilson: That is correct.

The Chairman: Do you anticipate that progression to continue or to abate somewhat?

Mr. Wilson: No, there would be a levelling off. There would still be growth, but there would be a levelling off. The philosophy or theory is that year one, for us, will be a year of establishment—establishment in the sense that the community we are operating in will get to know us and we will get to know our community. We do not look for explosive growth in the first year at all, but once established, once we are known and once we know our markets, then we feel that we will be able to move forward.

The Chairman: Do you feel you have a special pull that will bring in deposits? On what have you based your anticipated amounts?

Mr. Wilson: By and large I think our ability to attract deposits is the credibility that will be attached to the name of Northland Bank. Of course, the capitalization plays a part, but perhaps more important would be our sponsoring participants in the equity.

Mr. Willson: Mr. Chairman, if I may add to that, as part of our preliminary investigation I had personal conversations with the finance ministers and/or treasurers and deputy finance ministers of each of the three provinces in order to make them fully aware of our intention to be in business, should we be chartered. I indicated to them our wish to be considered and to be given the opportunity to bid on any of the deposit money that they might have available. I received in each case a favourable response, a response of interest, and they requested that we keep them posted on our progress.

Beyond that, we have had indications from a number of smaller business people, whom we contacted through the several trade associations that are representative of western Canadian business, that they will be interested in being advised of our opportunity. So we are encouraged to think that the visibility will be high once we are in a position to announce our licence to operate.

Senator Macnaughton: May I ask how many branches you would start off with?

Mr. Willson: With one only, sir.

Senator Macnaughton: That is not located in Winnipeg?

Mr. Wilson: No, in Calgary. It would be, in effect, an extension of our executive office, to keep our overhead as low as possible in the initial stages. Simultaneously, however, we would open what we are calling an agency office, with a skilled and highly trained representative, in each of the cities of Edmonton, Regina and Winnipeg, so that we would be represented in all three provinces simultaneously, but with the head office in Calgary. I am sure our chief executive officer could explain better than I just how that would work.

Senator Macnaughton: What about British Columbia?

Mr. Willson: We have no present intention of being operative in British Columbia. Our initial plans call for opening in Manitoba, Saskatchewan and Alberta.

Senator Molson: Why did you choose to separate your executive and head offices at the initial stage?

Mr. Willson: The major reason for this, Mr. Chairman and honourable senators, was that we wished to be as representative as possible of the economic development of all three provinces. We hope we have made what will turn out to be a wise political and banking decision. By establishing our head office in Winnipeg, we will be visible in Manitoba, for example.

The conventional wisdom of the bankers of whom we sought counsel was that the best place to locate for assistance in creating a new money market, throughout the three provinces named, would be Alberta. For time zone reasons, for money market reasons, for the reason that the Calgary exchange is now attracting major companies, the banking opinion was that we should locate our executive office there. It is our hope that at the same time we will be significantly visible in Saskatchewan by our operations there. The reason for these decisions, however, was really to have both visibility and executive discretion.

Senator Smith: Perhaps I did not follow closely enough to realize what Mr. Willson said. I did not gather from his answer that they had any really substantial commitments, from people who would be prepared to do business with them, by way of deposits. Perhaps I missed something he said. I noticed that he said provincial governments were interested, but one can be interested in something without doing very much about it.

Mr. Willson: Mr. Chairman, we realize that it would have been possible for us to present ourselves to you with half a million dollars on deposit, that is, with half a million dollars of capital in hand, and with the suggestion of a number of deposits that would be forthcoming. We have chosen instead, however, to present ourselves to you with half of our intended paid-in capital already committed, which to us suggests a commitment on the part of our subscribers, of some substance, together with the influence of a number of deposits which will be made not only by them—because these are substantial enough businesses to make deposit money available to us—but also the favourable attitude of the governments.

We felt that we could not proceed, in all honesty, however, to an aggressive position with regard to soliciting deposits until we had a charter to do so and a chief executive officer in place who could explain what he would do with this money.

Senator Macnaughton: Did you say that you have commitments amounting to $5 million?

Mr. Willson: Yes, sir.

Senator Macnaughton: In writing, I assume?

Mr. Willson: We have already begun to call on that money.

Senator Lang: How much of that is from co-operatives?

Mr. Willson: The commitment, so far, is exclusively from co-operatives.

Senator Molson: I think you said in your brochure that no individual co-operative would have an interest of greater than 10 per cent, did you not?

Mr. Willson: Yes, sir. That is correct.

Mr. Chairman, there are two aspects to this. In our discussions with his department, the Inspector General made us very keenly aware that no subscriber will have more than 10 per cent of the total issued capital. Beyond this, the co-operative credit unions themselves, by reason of the fact that they are deposit gathering institutions, will be limited, in aggregate, to 25 per cent of the capital at any one time. The credit unions, the credit societies, the caisses populaires or any other such organization that might wish to invest will be limited to the aggregate of 25 per cent, and in fact they presently have less than that.

Senator Cameron: Mr. Chairman, I know that over the years the co-operative organizations have always talked about the desirability of establishing what is, in effect, a co-operative bank. In your discussions with them, Mr. Wilson, have you had the assurance that they will look upon this bank as a co-operative bank medium? Have they given you any special encouragement to think that they will use this bank to a greater extent than would ordinarily be the case?

Mr. Willson: Mr. Chairman, this question intrigues me. As a matter of fact, one of my discoveries in Britain was that the Manchester Bank for Co-operatives is the exclusive bank for the credit societies in Britain, who transfer their liquidity on the hour to that bank. I brought this message back, as an as yet uneducated layman, for the examination of the Inspector General, but he quickly made me aware that there could be no such thing as a co-operative bank in Canada. There can only be a bank under the Bank Act; hence, a co-operative bank could not be countenanced.

What I have discovered is that a number of the very large co-operatives are well served by existing banks, and that relationship, I think, will continue. We have every indication that it will. Some of the smaller co-operatives feel—and this is not our statement, but theirs—that they are not as well served as they would like to be, and we would assume that they will seek to work with us; but I can see us, Senator Cameron, competing with the other banks for the favour of the co-operatives, and for co-operative business, and, frankly, being able to do so because of the uniqueness of our structure.

Senator Macnaughton: Mr. Chairman, I am not sure if this question is fair, although I mean it to be fair. Mr. Willson, are you in a position to disclose the name of the international investor?

Mr. Willson: Mr. Chairman, there are no international investors at this point in time. My reference to that was simply to indicate that we have provided, in our principles of operation, for the possibility of using up to 10 per cent of our total paid-in capital as a means of securing and cementing correspondent relationships with a bank, for example, in Europe, with another in the United States, with another on the Pacific rim, to support and help realize the export transactions and expectations of our customers. Whether or not we will need to use it to establish that correspondent relationship, we do not know, and that is why I say that it is simply an enabling resolution within our board.

Senator Lang: If I may, I would like to revert to the question of share subscriptions. My arithmetic is not good, and I am a little confused about the percentage ratios. I believe the witness said that no more than 25 per cent of the paid-up capital will be owned by the co-operatives.

Mr. Willson: By the co-operative credit unions.

Senator Lang: That would require a paid-up capital of $20 million?

Mr. Willson: No, the co-operative credit unions presently hold $2.1 million, and they may go as high as $2.5 million. That is 25 per cent of the $10 million that will be paid in.

Senator Lang: So of the $5 million you have referred to, that is not all money from the co-operatives; in fact, it is less than half.

Mr. Willson: Less than half is from the credit unions and the balance is from a diversity of businesses which happen to be co-operative businesses, but they are not credit unions or in any way related to them except by chance.

Senator Cameron: Does this include the wheat pools?

Mr. Willson: At this point no one of the wheat pools is a subscriber. These were in fact examples of some of the co-operative customers of the major chartered banks to which we referred, and it is doubtful if we would have the assets to be able to satisfy their needs for sometime.

Senator Molson: But you have no limitation in any form that makes you deal either through shareholdings or business or in any other way with co-operatives; I mean, you are a normal bank whose initial financing and whose initial impetus has been provided by the co-operatives, and that is all.

Mr. Willson: That is correct, sir.

Senator Molson: Five years from now the input or output from the co-operatives may be five per cent of your total; it may be negligible.

Mr. Willson: We will be a bank in every sense of the word.

Senator Molson: I mention this, Mr. Chairman, because we remember when the Unity Bank was being incorporated and the ethnic subject came up. It was predicted here that it would not survive in the form in which they presented it and there was some skepticism at the time. I merely mention this because there is no string in your case that ties you to the co-operatives in any way. You just happen to have some co-operatives who are going to subscribe and deal with you.

Mr. Willson: That is correct, and as a matter of fact that interest has survived already some four years of careful examination.

The Chairman: Are there any other questions?

Mr. Willson, this bill was first presented in the Commons, and I gather the witnesses appearing here also appeared before the Commons committee.

Mr. Willson: That is correct.

The Chairman: Are there any further questions?

I should tell you that I have a letter from our acting assistant law clerk advising us that this bill, in his opinion, is in a proper form, and if enacted by Parliament would accomplish the objectives of the bill as set out in the petition.

Senator Haig: I move that the bill be reported without amendment.

Senator Molson: Are we going to hear from the Inspector General?

The Chairman: Yes. Mr. Read, will you come forward, please? You have a direct interest in all banks and in the incorporation of banks as to their purposes, et cetera.

Mr. C. L. Reed, Inspector General of Banks: Yes.

The Chairman: You have been consulted in connection with the application of this bank?

Mr. Read: Yes, the sponsors of this proposed bank have kept me informed of their plans and objectives, and I have no objection to the bill before you.

The Chairman: And you have no objection to the role of the co-operatives and credit unions in this operation?

Mr. Read: No, Mr. Chairman, but I did welcome the statement Mr. Willson made that it is the intention of the bank that the credit unions will not individually exceed 10 per cent, and that the credit unions in total will not exceed 25 per cent.

The Chairman: In the course of carrying out your duties you will be able to determine whether this intention has been carried through or not.

Mr. Read: Yes, sir, we receive regularly from all banks a statement of shareholders.

The Chairman: Suppose for a moment you do find the intention is not being carried out completely, what is your position in that situation? What do you do?

Mr. Read: Under the present act the shareholdings and the limitations in respect of shareholdings do not identify clearly other than corporate shareholders and persons. This would be a stated intention by the bank, and I would presume that they would incorporate it in the by-laws of the bank, if they have this statement of intent.

The Chairman: You say you presume they would, but is it part of your work to check the by-laws to see whether these things have been carried out?

Mr. Read: Yes, it is.

Senator Molson: There have been some rather recently incorporated banks that have broken even at the end of

one year. The Unity Bank did not break even, but I think the Bank of British Columbia broke even fairly quickly.

Mr. Read: Speaking from memory, I think the Bank of B.C. did have a relatively small profit at the end of the first year, but they did not branch as quickly as Unity Bank.

Senator Lang: When applicants for a charter by Act of Parliament come before you, what are the main areas into which you make inquiry in order to form your opinion?

Mr. Read: I suppose most of them are similar to the interests of a committee of Parliament when it considers a proposed incorporation. First of all, one is interested in the promoters themselves, the sponsors of the bank. One looks at the reputation they have in the business community and what their records have been in the area of carrying on private business. Secondly, one is interested in whether or not, on the basis of the plans and objectives they have, they are probably able to obtain sufficient confidence of investors to achieve the capital structure they are proposing. Thirdly, one considers, I think, whether they are likely to be able to attract the competence and expertise which will be required to establish and develop a bank. I think one looks at all these three things.

Senator Lang: When the bank is chartered, what control, if any, do you have over its rate of branching or its rate of expansion?

Mr. Read: Under the Bank Act a bank has the power to establish branches. There is no regulation or limitation on the extent to which or the speed at which they branch. This is basically a decision of management.

Senator Lang: At any point do you have authority to step into a bank and revoke its certificate?

Mr. Read: No, sir.

Senator Lang: Does that power reside in the Minister of Finance?

Mr. Read: No, it resides really in Parliament. Under the Bank Act the powers of banks to continue business expire at the end of a decennial period. Currently that period expires at the end of June, 1977. Of course, prior to that date there must be a review and revision of the Bank Act.

Senator Lang: What if its leverage got up to a hundred times? Is there no authority, statutory or otherwise, to limit that?

Mr. Read: There is no statutory authority. The question of leverage was considered by the Porter commission prior to the last decennial revision and the recommendations were that there should not be statutory limitations on leverage, that this should be left basically to the judgment of the management and the market place.

Senator Lang: Maybe we ought to discuss this in 1977.

Senator Molson: You do have other checks, though?

Mr. Read: Yes. The office, of course, has a good deal of information provided to it on a very firm basis, and discussions are held with management on that and any other aspects of their business.

The Chairman: You are concerned, Mr. Read, as to the relationship of the policy of the bank in the public interest to the extent that they gather deposits.

Mr. Read: Yes.

The Chairman: Is there any specific activity that you carry on in that connection?

Mr. Read: In connection with the gathering of deposits?

The Chairman: Deposits are attracted; they must be attracted on some basis. Therefore, should your concern not be in connection with the policies of the bank, its investment policy, et cetera, to insure that the depositors are protected?

Mr. Read: Yes. This, of course, is one of the, I suppose, prime functions of the office of the Inspector General of Banks . . .

The Chairman: I thought it was.

Mr. Read: —to carry out annual examinations, at least, of every bank to protect both the shareholders and the depositors.

The Chairman: Is the committee ready to deal with the bill?

Senator Haig: I move that the bill be reported without amendment.

The Chairman: Is that unanimous?

Hon. Senators: Agreed.

The Chairman: I shall so report. The meeting is adjourned.

The committee adjourned.

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FIRST SESSION—THIRTIETH PARLIAMENT
1974-75

THE SENATE OF CANADA

PROCEEDINGS OF THE

STANDING SENATE COMMITTEE ON

BANKING, TRADE AND COMMERCE

The Honourable Alan A. Macnaughton, P.C., *Acting Chairman*

Issue No. 74

WEDNESDAY, DECEMBER 17, 1975

Complete Proceedings on Bill C-74 intituled:

"An Act to amend the Regional Development Incentives Act"

REPORT OF THE COMMITTEE

(Witnesses: See Minutes of Proceedings)

29893—1

THE STANDING SENATE COMMITTEE ON BANKING, TRADE AND COMMERCE

The Honourable Salter A. Hayden, *Chairman*

The Honourable Senators:

Barrow
Beaubien
Buckwold
Connolly
(*Ottawa West*)
Cook
Desruisseaux
Everett
*Flynn
Gélinas
Haig
Hayden
Hays
Laird
Lang
Macnaughton
McIlraith
Molson
*Perrault
Smith
(*Colchester*)
Sullivan
Walker—(19)

Ex officio members

(Quorum 5)

Order of Reference

Extract from the Minutes of the Proceedings of the Senate, December 15, 1975.

"The Order of the Day being read,

With leave of the Senate,

The Honourable Senator Smith (*Colchester*), resumed the debate on the motion of the Honourable Senator Macnaughton, P.C., seconded by the Honourable Senator Sparrow, for the second reading of the Bill C-74, intituled: "An Act to amend the Regional Development Incentives Act".

After debate, and—

The question being put on the motion, it was—

Resolved in the affirmative.

The Bill was then read the second time.

The Honourable Senator Macnaughton, P.C., moved, seconded by the Honourable Senator Godfrey, that the Bill be referred to the Standing Senate Committee on Banking, Trade and Commerce.

The question being put on the motion, it was—

Resolved in the affirmative."

Robert Fortier,

Clerk of the Senate.

Minutes of Proceedings

Wednesday, December 17, 1975
(95)

Pursuant to adjournment and notice the Standing Senate Committee on Banking, Trade and Commerce met this day at 9:35 a.m.

SUBJECT: Bill C-74—"An Act to amend the Regional Development Incentives Act".

Present: The Honourable Senators Barrow, Beaubien, Laird, Macnaughton and Smith (*Colchester*). (5)

In Attendance: Mr. R. L. duPlessis, Acting Assistant Law Clerk and Parliamentary Counsel.

Upon motion duly put by The Honourable Senator Laird, The Honourable Senator Macnaughton was elected *Acting Chairman*.

The following witnesses were heard:

Department of Regional Economic Expansion:

Mr. Marc Daniels, Assistant Deputy Minister;

Mr. James Wansbrough, Director of Incentives;

Present but NOT heard:

Miss Diane Boivin, Special Assistant to the Minister;

Mr. Val Traversy, Assistant to the Assistant Deputy Minister.

Upon motion duly put by the Honourable Senator Laird, it was *Resolved* to report the said Bill without amendment.

At 10:30 a.m. the Committee adjourned to the call of the Chairman.

ATTEST:

G. A. Coderre,
Clerk of the Committee.

Report of the Committee

Wednesday, December 17, 1975

The Standing Senate Committee on Banking, Trade and Commerce to which was referred Bill C-74, intituled: "An Act to amend the Regional Development Incentives Act", has, in obedience to the order of reference of Monday, December 15, 1975, examined the said Bill and now reports the same without amendment.

Respectfully submitted,

Alan A. Macnaughton,
Acting Chairman.

The Standing Senate Committee on Banking, Trade and Commerce

Evidence

Ottawa, Wednesday, December 17, 1975.

The Standing Senate Committee on Banking, Trade and Commerce, to which was referred Bill C-74, to amend the Regional Development Incentives Act, met this day at 9.30 a.m. to give consideration to the bill.

Senator Alan A. Macnaughton (*Acting Chairman*) in the Chair.

The Acting Chairman: Honourable senators, this morning we have before us Bill C-74, an act to amend the Regional Development Incentives Act. To deal with this we have at least two witnesses. The first is Mr. Mark Daniels, Assistant Deputy Minister, Planning and Co-ordination, Department of Regional Economic Expansion. The second is Mr. John Wansbrough, Director General, Industrial Incentives Branch, of the same department.

The bill, as was explained in the Senate the other day, has the object of extending the Regional Development Incentives Act for a further five-year period. So far as I am aware, there are no other changes.

Have you an opening statement you wish to make, Mr. Daniels?

Mr. M. R. Daniels, Assistant Deputy Minister, Planning and Co-ordination, Department of Regional Economic Expansion: Mr. Chairman, the bill now before you would serve, as you pointed out, simply to extend the Regional Development Incentives Act for a period of five years. No other changes are incorporated in the legislation.

First passed in 1969, at the same time as the Department of Regional Economic Expansion was created, the Regional Development Incentives Act provides for a federal program designed to stimulate increased manufacturing investment and employment in the slow-growth regions of Canada. Under the act, the areas of the country designated for assistance include all of Newfoundland, Nova Scotia, Prince Edward Island, New Brunswick, Manitoba and Saskatchewan. Most of Quebec, excluding only the Montreal-Hull corridor, has been designated, as has been northern Ontario, down to and including most of the districts of Parry Sound and Nipissing. Currently under consideration are the Renfrew-Pembroke Special Area in Ontario, and the Kootenay Region of British Columbia, whose designations are due to expire shortly. In Alberta, specialized forms of incentives are available through other DREE programs.

By encouraging firms, through different types of financial incentives, to decide to locate, expand or modernize in one of these areas, the department aims to improve employment opportunities and, over time, reduce regional disparities and achieve more balanced economic growth across Canada.

According to the most recent program statistics, the incentives program has helped to generate approximately $2.4 billion in capital investment, and create 122,000 direct manufacturing and processing jobs, through the provision of some $507 million in grants.

As you know, the department decentralized in the spring of 1974. One of the most important effects of decentralization has been within the regional development incentives program. Because provincial and regional officers have such significantly increased decision-making authority, more than 70 per cent of all incentives decisions are made at that level now, where officers are familiar with local conditions and local business opportunities.

Other important changes made to the program after the department's policy review of 1972- 73—for example, standardized formulae—have resulted in faster decision making and a more smoothly functioning program that is very much an integral part of DREE's overall policy approach.

The minister has stressed that it is important that the incentives program be seen in this perspective—that is, how it relates to the department's other principal policy mechanism.

Referring back to the department's policy review, the most important recognition that emerged was that each region of Canada, indeed each province, has its own unique set of economic and social circumstances and opportunities, and that each must have its own special set of measures designed to take advantage of these. The result was the concept of the General Department Agreement, or GDA.

The GDAs are umbrella agreements that spell out mutually agreed-upon federal-provincial objectives, set out a broad strategy for development based on an analysis of the province's social and economic needs and conditions, and outline methods for implementing the strategy.

Under the aegis of the GDAs, subsequent subsidiary agreements are signed to focus on specific development opportunities, ranging from forestry development in New Brunswick to nutritive processing assistance in Alberta, from municipal infrastructure assistance in British Columbia to steel development in Quebec. Often the regional development incentives program serves to complement such subsidiary agreement activities. A good example of this is the Saskatchewan steel agreement signed in July, 1974, under the terms of the GDA with that province. It aims to produce a capital investment of $150 million in primary and secondary iron and steel facilities, which could provide good jobs for more than a thousand people. Special efforts are being made to ensure that certain types of firms, complementary to the subsidiary agreement initiatives, are induced to locate in Saskatchewan through RDIA.

As with all of DREE's program activities, there runs a strong thread of co-operation, both with other federal

departments and with provincial governments, in the administration of the regional development incentives program.

For large and complex incentives projects, DREE established the Regional Development Incentives Board, to provide advice to the Minister of Regional Economic Expansion and to ensure co-ordination among those federal departments most affected. The chairman of the Regional Development Incentives Board is the deputy minister of DREE, and its membership includes senior representatives from the Department of the Environment, the Department of Finance, the Department of Industry Trade and Commerce, the Department of Manpower and Immigration, and other departments when necessary. As well, of course, DREE's officials in regional and provincial offices are in regular touch with their counterparts in other federal departments and related provincial government departments.

To recap, Mr. Chairman, the bill before you now for consideration would serve to extend the Regional Development Incentives Act to 1981. Although the present act does not expire until December 31, 1976, applicants with accepted incentives offers must be in commercial production by that date in order to receive incentives payments. This bill, then, is intended to extend that commercial production deadline another five years, to December 31, 1981.

The Acting Chairman: Thank you, Mr. Daniels.

Are there any questions?

Senator Smith: Mr. Chairman, the first question I would like to ask is, what is the reasoning by virtue of which it was determined to limit this extension to five years?

Mr. Daniels: It was felt that a five-year extension would provide the minister with an opportunity properly to publicize the program, to continue the initiative under the program, but that within a five-year period the minister would want to review the legislation again before Parliament, possibly to propose other changes, and, indeed, it was felt that the act should be looked at periodically by Parliament and, where appropriate, amended. In this particular instance we felt, as a result of the regulation changes that occurred about a year ago, that nothing was required beyond a simple extension, but the five-year period seemed to be long enough to permit the continuation of the program. However, it may be appropriate to review the legislation again within that period.

Senator Smith: Having been very familiar with this program, both before its inception and afterwards, and the problem it is designed to deal with it strikes me that five years is a completely inadequate period to achieve its main objective—that is, to narrow substantially the disparities between the so-called, slow-growth regions, and other parts of the country.

Mr. Daniels: I certainly do not believe that there is any intention on the part of the minister to allow the act to simply fall away after five years. Indeed, the period, as I mentioned, was just a period in which it was judged that the minister and members of Parliament might wish to review the act itself.

Senator Smith: I can think of some comments about that which would be more appropriate to make to the minister, so I will reserve them until some other occasion. I take it, then, that so far as you are able to say there is no intention of bringing this program to an end at the expiration of the time period set out in the bill.

Mr. Daniels: No, there is no intention, so far as I know, to terminate the act.

The Acting Chairman: Well, that is really a matter of government policy.

Senator Smith: I understand it is, but I think I am entitled to ask the witness what he knows about it. I was not asking him to express any opinions on it.

I notice that there have not been—at least, from your last annual report—many efforts made to utilize the provisions in the amendment to the act in 1971 bringing commercial facilities within the scope of its activities.

Mr. Daniels: The amendment in 1971 was to include a loan guarantee program, and under that loan guarantee program, unlike the grants part of the legislation, certain commercial facilities are included; and that, of course, is a provision of the act presently. The level of loan guarantee activity is not particularly high, but that certainly is not because the department is not interested in that program; it is there to be used.

Senator Smith: I rather thought, from the remarks of the minister, that in fact that was the reason for the low level of activity—that the department is not interested in this kind of thing, particularly in the service field.

Mr. Daniels: The minister stated that as a matter of policy he did not feel that the grants part of the program should be extended to cover the kinds of commercial facilities covered by incentives under the loan guarantee part of the program. He argued, I believe, that the other instruments which the department had in hand were sufficient to meet that class of commercial activity that the department felt would be worth underwriting.

Senator Smith: I think I agree with you—on my reading of what he said, in any event—but I think he also indicated that even with relation to the loan guarantee provisions of the amendment of 1971 the department was not very enthusiastic. Did I misinterpret what he said?

Mr. Daniels: As far as I know, there is no intent on the part of the minister or the department to down-play the use of any feature of the program as it presently exists. Certainly, the honourable senator is talking about a question of whether or not the grants part of the act are to be extended to include some kind of commercial facilities. That question has been reviewed by the minister, and the decision was made that we had enough instruments in hand. But I do not believe there was any notion there, certainly not one that I am aware of, to down-play the loan guarantee instrument.

Senator Smith: Do you think that the department would agree that in opportunities for growth or employment the services sector provides about as many opportunities as you can find in any other sector of the economy?

Mr. Daniels: I think it is well understood that the services sector is obviously a very important part, and, indeed, it is a faster growing sector than the manufacturing sector, so we are well aware of that.

Senator Smith: Would you be able to make an estimate of the total number of loan guarantees that have been

made under the amendment making such guarantees possible to commercial facilities?

Mr. Daniels: Yes, senator; if I recall the number, it is somewhere in the neighbourhood of 42.

Senator Smith: Does the recollection of the witnesses enable them to give some estimate of how those are distributed throughout the country?

Mr. Daniels: I am sorry, but I cannot give an accurate view of that. I doubt very much that we have that data in hand, although I can determine it. I cannot tell you offhand how it would be distributed, Mr. Chairman.

Senator Smith: I would be very grateful if, at your reasonable convenience, we could be given that information.

Mr. Daniels: Certainly.

The Acting Chairman: Would you supply that to the Honourable Senator Smith, please?

Mr. Daniels: Yes, I certainly will.

Senator Smith: I am aware of the provisions of the act as to designated regions and so on, but I wonder what criteria the department actually uses in coming to a conclusion as to whether an area should be designated.

Mr. Daniels: As I indicated in the opening statement, the majority of the country now falls into and under the aegis of the Regional Development Incentives Act, with the exception of Southern Ontario and the Montreal-Hull corridor. It includes, certainly, all the Atlantic area, Quebec, Saskatchewan and Manitoba. Alberta has a special arrangement under a sub-agreement, which bears close relationship to the Regional Development Incentives Act, and parts of British Columbia are still left designated. I believe, Mr. Chairman, that when the regulations for the program were changed, approximately one and one-half years ago, the decision was made to designate rather larger areas. In connection with the question of designation, we have always run into the administrative problem of boundaries; there is always someone on one side of the line and not on the other. You may recall, Mr. Chairman, the map of the designated regions in DREE prior to this redesignation of areas. We, I think, from the point of view of administration found it difficult to rationalize from time to time why certain areas were included, and this is why the decision was made by the then minister to move ahead and designate as large areas as were sensible. It is true, however, that when one decides that the scope of the Regional Development Incentives Act does not duck down into the Toronto area one is faced with the problem of drawing a line. That line is drawn in terms of the best criteria that officials can suggest to the minister, who, of course, will decide eventually. Finally, it will come down to which counties are in and which counties are out. The minister will choose to review these from time to time as a function of, perhaps, economic conditions and other things. There is no doubt, however, that when one gets down to the business of drawing boundaries it becomes essentially a matter of choice, based on our best informatin as to local economic conditions in the area in which those boundaries are to be drawn.

Senator Smith: I can appreciate that difficulty, but I was interested in the criteria actually used by the department in overcoming that difficulty and reaching a decision as to whether a region should be designated and, if so, what the area thereof should be.

Mr. Daniels: As I say, when we review the areas, which we do periodically, we look at both administrative criteria and general economic criteria. We will examine them at as fine a degree as we can get them, and this, you will appreciate, is not always possible at sub-provincial level. However, we certainly consider such indicators as unemployment rates, participation rates in the labour force, per capita income levels and various indices of industrial activity and industrial structure. All these factors become, if you will, the quantitative inputs into the decision. However, I am sure that you will appreciate that it does come down to a matter of judgment, and the minister, when faced with as much information as we can raise for him on the economic circumstances of the regions, will then make a decision based on that information.

Senator Smith: Mr. Chairman, I certainly would not expect the witness to be able to recite all the various types of information which are used. However, he has used the phrase, after enumerating a few items such as unemployment, that there are various indicators in addition to those which he mentioned. I wonder if he could indicate some of these items which are covered by this phrase, "various indicators".

Mr. Daniels: Various indicators of industrial structure, for example, senator.

Senator Smith: Thank you.

Mr. Daniels: Allow me to give you an example. As you know, the question of industrial structure is a matter of considerable concern in the province of Quebec. We are very concerned to look at the proportion of durable versus non-durable goods industries in that province. That happens to be criteria within the manufacturing sector and one of the objectives of the department, as indeed is provided in the General Development Agreement, is to increase the level of activity in the durable goods industries. In the Atlantic area, for example, we examine the proportion of manufacturing activity to total activity. Is that the type of answer which is suitable?

Senator Smith: Yes, thank you; that is helpful. Are there other what might be termed "general criteria," such as the manufacturing structure, which seem to be important in making these decisions?

Mr. Daniels: When the decisions are made, really, the department examines indicators and raises indicators which might give the minister insights as to the particular economic problems faced by each region. I do not believe that anyone would be prepared to say that there is some collection of indicators which would provide a minister with an all-purpose view or some kind of quantitative measure which would provide a definitive set of criteria against which to make a judgment. Therefore, because the department regularly reviews the economic conditions, for example, in each province, we would, on that basis, recognize and make judgments, perhaps, that there were certain structural problems in a province and would begin to investigate these. Out of that we would come up with a composite picture. However, it is not necessarily the same kind of considerations, for example, that one faces in dealing with a similar problem in Western Canada. By way of example, I think it is certainly well known that if one were to use unemployment rates as the sole criteria for designating regions, one would not look at the province of

Saskatchewan as a prime province for the RDIA, because the unemployment rate there is very low. I think honourable senators would be quick to realize that that would not be an adequate criterion by which to measure the rate of industrial development in Saskatchewan. There are many other indicators we have to look at. So I hope, Mr. Chairman, I am putting the response in the right light. I think it is important that my answer make clear that we do not believe that there is some definitive, unique set of criteria which we could automatically apply and get an answer. I think the minister would want to be able to use his judgment complemented by such regional, and indeed subregional, data as indicators as we could muster.

Senator Smith: Is it fair to say that there is a very large area of judgment or, to put it another way, a very large area for the exercise of the minister's discretion in deciding whether or not an area shall be designated?

Mr. Daniels: I think that is correct. The minister does have discretion under the act—the Governor in Council, and the minister so recommends. Indeed, he has considerable discretion.

Senator Smith: You mentioned the General Development Agreements. As I think I understand them, they are more concerned with matters related to general development and infrastructure of a particular region or area rather than assistance to specified kinds of undertakings.

Mr. Daniels: Mr. Chairman, the honourable senator is correct in characterizing the General Development Agreements as being more concerned with identifying the development climate of a particular province, of articulating with a province where the development opportunities lie within the province, and then using the subsidiary agreements or action pacts which are the specific instruments under the General Development Agreement. The provinces and the federal government agree together to exploit jointly the development opportunities—although I would hasten to add that some of them, I would say, are industry specific. I would call the honourable senator's attention, for example, to the steel agreements in Saskatchewan and Quebec. Those are quite industry specific, but they indeed involve components that may very well go beyond the specific industry. They will, Mr. Chairman, include perhaps some infrastructure assistance; but the idea there is to get a development package together, and that you would have to put in apposition to the Regional Development Incentives Act, which is strictly aimed at the firm, and we work directly with the firms although in consultation with the provinces.

Senator Smith: I am not sure whether I should direct this question to the witness rather than the minister, but I would like to see what the witness feels he is able to say. I notice that in connection with some agreements under negotiation with the Province of Nova Scotia, some ministers of that province, the government, in any event, are complaining that it is taking a while to get somewhere with the agreements. I am not sure whether or not you are aware of the comments.

Mr. Daniels: Mr. Chairman, I have read some of the comments, those made by Senator Smith in the Senate, and also those made in other areas. I can say that it is a matter of policy, and the minister certainly has made it clear that when his officials are working with provincial governments—not just the Province of Nova Scotia but, indeed, the other provincial governments as well—especially when the programs involved are very substantial—some of the issues are very complex—he wants to be assured, as I am sure you appreciate, that the quality of the package which is finally submitted, and which may involve several tens of millions of dollars in both federal and provincial aid, is put together in the best possible way. I think the minister's position on this has certainly been made clear. How one interprets that, whether or not it is "undue delay," I am certainly not in a position to say.

Senator Smith: I would hardly expect you to. However, perhaps it would not be unreasonable to ask you how long these agreements which Nova Scotia is complaining about have been in process of discussion.

Mr. Daniels: I really do not have that information to hand. I can perhaps answer the honourable senator's question in a more general way. Some of the agreements are under discussion with the provinces for a long time, and they evolve considerably during that discussion process.

I would hope that we could make clear that the purpose of the General Development Agreements is for the federal government to work co-operatively with the provinces in articulating a development package. I must say that the intent of having a decentralized DREE organization with substantial planning and implementation capacity in the field is not to react passively to provincial initiatives. I think it is very much a process of co-operative design. So some of the ideas may take considerable shaping before they are put into a form which the minister finds acceptable.

Really, Mr. Chairman, I do not think I can give the honourable senator any generalized statement on the time involved. Sometimes projects are carefully articulated and move quickly; at other times they are not.

Senator Smith: I can understand that, Mr. Chairman. I get involved in some of those that seem to take a very long time. It intrigues me, however, that these agreements apparently take so long that the ministers of the government concerned feel it necessary to take a public stand of criticism. That would strike me as being somewhat unusual.

Mr. Daniels: Mr. Chairman, I am really not in a position to comment upon what provincial ministers would say.

Senator Smith: I would not insist. I think that is fair enough.

On another line altogether, I wonder if the witness could indicate the locations of the head offices in the various regions which are now functioning in the program of decentralization.

Mr. Daniels: There are assistant deputy ministers now located in Moncton, Montreal, Toronto and Saskatoon. There is a director general in each of the provincial capitals—except in Ontario, where the director general is located in a branch office, in Thunder Bay. The assistant deputy minister in the west has four provincial directors general under him. There is a Toronto office and a Montreal office which deal with those two provinces. Then the assistant deputy minister, East, has four provincial offices. There are also one or two regional offices—Rimouski, Bathurst, Thunder Bay.

Senator Smith: I have only one more question at the moment, Mr. Chairman. It concerns curiosity rather than anything else. I was quite taken with the reference in your

report to the Abenaki Motor Inn, which is near where I live. I presume your witness is familiar with what appeared in the report about it.

Mr. Daniels: Yes.

Senator Smith: I do not want to ask a question of policy or information which you might consider to be necessarily confidential, but are there any other enterprises of this kind contemplated related to native people?

Mr. Daniels: Mr. Chairman, as a point of clarification, does the honourable senator mean in Nova Scotia or in general?

Senator Smith: Anywhere in the country under the program. Of course, I am particularly interested in Nova Scotia

Mr. Daniels: I can answer in general terms, but not with regard to a particular project, like the Abenaki Motor Inn. The Minister of Regional Economic Expansion is responsible for it. That project went ahead under the aegis of ARDA

There is a special ARDA program in the West, which is a mini-incentives program dealing with native peoples. So, there are quite a number of initiatives of that kind—not specifically referring to motel operations but native peoples' enterprises which are being worked on under the aegis of special ARDA or ARDA.

Senator Smith: I suppose my question was rather general. What I meant were those kinds of enterprises which are either motel operations or operations of a similar nature.

Mr. Daniels: Mr. Chairman, I really do not know the answer in specifics to the question.

The Acting Chairman: Is there anyone here who could answer that question?

Mr. J. Wansbrough, Director, Industrial Incentives Branch, Department of Regional Economic Expansion: There are some such projects. I am not able to give an indication of the number, but there are some.

Senator Smith: I have no further questions, Mr. Chairman. I certainly wish to express my gratitude for your patience and that of the other members of the committee and the witnesses.

The Acting Chairman: That is why we are here.

Senator Laird: Question!

The Acting Chairman: Shall I report the bill without amendment?

Hon. Senators: Agreed.

The committee adjourned.

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